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HOUSE..... .....No. 32.

REPORT

RELATING TO

CAPITAL PUNISHMENT.

Commonwealth of Massachusetts.

House of Representatives, Jan. 12, 1836.

Ordered, That Messrs. Rantoul, *of Gloucester*,
Fay, *of Chelsea*,
Boyd, *of Boston*,
be a committee to consider the expediency of abolishing Capital Punishments.

L. S. CUSHING, *Clerk.*

Commonwealth of Massachusetts.

House of Representatives, Jan. 16, 1836.

Ordered, That so much of the Address of His Excellency the Governor as relates to "Capital Punishment," be referred to the select committee who have that subject under consideration.

L. S. CUSHING, *Clerk.*

Commonwealth of Massachusetts.

House of Representatives, Feb. 22, 1836.

The Committee appointed to consider the expediency of abolishing capital punishments, to whom was referred so much of the Address of His Excellency the Governor as relates to capital punishment, and numerous petitions from the citizens of the Commonwealth, praying that capital punishment may be abolished, have considered that subject, and respectfully ask leave to

REPORT:

That they view the question submitted to them as one of momentous importance—deeply concerning the general welfare of society, by its connexion with, and influence upon the prevailing standard of moral rectitude, and in the ultimate decision of which, according to the fundamental principles of Christian morality, not only each legislator, but every member of the community, ought to feel a solemn interest and an individual responsibility. The undersigned have approached this question with an

anxious solicitude to arrive at a definite and correct conclusion; that, if their enquiries should result in the melancholy conviction that it is necessary to take away human life, in all or any of the cases for which the present laws prescribe the penalty of death, they might be able to produce such proofs of that necessity, and assign such arguments for the justice of the exercise of the highest prerogative ever claimed by human governments, the power of life and death, as would be satisfactory and unequivocal, and sufficient to remove the painful doubt, of late so common, whether we have good warrant for the legislation now under consideration. If, on the other hand, this investigation should lead to the decision, so grateful to humanity, that we are not called on in any case to pronounce the life of any individual forfeit to society, and to be sacrificed for the common safety, but that human life, as it is the gift of the Almighty, is by his fiat alone to be taken away, then the undersigned would most ardently desire to place that truth in a light so clear that no candid mind could resist the evidence which sustains and enforces it.

Your committee derive much encouragement, in entering upon the inquiry before them, from the fact that it comes to them with the eloquent and emphatic recommendation of his excellency the Governor in his address on the organization of the government of the Commonwealth for the current political year.

"The subject of crime and punishment has for several years received much attention," says his excellency, "both in Europe and America; and it is generally admitted, that discoveries and improvements of great practical importance have been made in this country. These improvements are in successful operation, at the states

prison in Charlestown." It may be worth our while to recollect that most of these discoveries and improvements now sanctioned and approved in our own sphere of observation, by "the test of the sure teacher, experience," were originally suggested by the late Jeremy Bentham, to all whose plans of reform, as well those adopted by his excellency in his address as others, the epithets, radical and visionary, were but a few years ago indiscriminately applied, and that too, much more loudly and confidently than the same epithets, are now applied, by some few devoted adherents to ancient usages, to the meliorations of the criminal code which his excellency recommends. His excellency remarks in continuation, that "The ancient rigors of the penal code have been mitigated. Punishments revolting to humanity have been abolished, and others substituted, which are believed to answer, with equal efficacy, all the ends of penal justice; and which are more conformable to the humanity of the age, and to the mild spirit of Christianity. A grave question has been started, whether it would be safe altogether to abolish the punishment of death. An increasing tenderness for human life is one of the most decided characteristics of the civilization of the day, and should in every proper way be cherished. Whether it can, with safety to the community, be carried so far, as to permit the punishment of death to be entirely dispensed with, is a question not yet decided by philanthropists and legislators. It may deserve your consideration, whether this interesting question cannot be brought to the test of the sure teacher,—experience. An experiment, instituted and pursued for a sufficient length of time, might settle it on the side of mercy. Such a decision would be matter of cordial congratulation. Should a contrary result

ensue, it would probably reconcile the public mind to the continued infliction of capital punishment, as a necessary evil. Such a consequence is highly to be desired, if the provisions of the law are finally to remain, in substance, what they are at present. The pardoning power has been entrusted to the chief magistrate; but this power was not designed to be one of making or repealing the law. A state of things, which deprives the executive of the support of public sentiment, in the conscientious discharge of his most painful duty, is much to be deplored." These remarks your committee believe to be applicable, though with different degrees of force, to ALL the crimes made capital by our existing code. They regard, however, only the expediency of the law, and do not touch the higher question, previous in its nature, of the right to inflict the punishment of death.

Though it may not be necessary for your committee to express an opinion upon the right, if after admitting the right, it should be found that upon grounds of expediency alone this punishment ought to be entirely dispensed with, yet as the right itself to take away life is now utterly denied by many thousand citizens of this Commonwealth, whose number seems to be rapidly increasing, your committee have thought it proper to state, so far as they understand them, the principles upon which this denial rests, leaving it to the wisdom of the legislature to allow those principles due weight in its deliberations.

It is said, then, that society is nothing but a partnership, and further, that it may with propriety be styled A LIMITED PARTNERSHIP, created and continued for SPECIFIC PURPOSES—for purposes which are easily defined. These purposes are all of them benevolent and philanthropic, and it is the continual boast of Americans that we have

succeeded in accomplishing them more uniformly and completely, and with less unnecessary suffering or avoidable injustice, than any association of men that has ever preceded us. This proud assumption of superiority rests, we believe, upon a foundation of truth, and is established impregnably in our history. Your committee would be among the last to deny or to doubt it: yet it is impossible that our system should be by any means perfect, since it is the work of finite human faculties, and since that approach towards perfection which is within the compass of human capacity must always be the tardy growth of many ages of gradual, irregular and often interrupted improvement. The class of reasoners of whom we are speaking, hold the infliction of capital punishment to be one of the most obvious vices in our present mode of administering the common concerns.

We are all of us members, say they, of the great partnership. Each one of us has not only an interest, but an influence, also, in its proceedings. Shall the partnership, under certain circumstances which will probably happen now and then, proceed deliberately, with much ceremony, and in cold blood, to strangle one of the partners? Has society the right to take away life?

THE WHOLE OBJECT OF GOVERNMENT IS NEGATIVE. It is for the protection of property, life and liberty. It is not for the destruction of any of them. It is not to prescribe how any one may obtain property, how long one may enjoy life, under what conditions he may remain at liberty. It was precisely to prevent the strong from controlling the weak in all these particulars, that government was instituted. It is to take care that no man shall appropriate the property of another, that no man shall restrain the liberty of another, that no man shall injure the

person, or shorten the life of another. Having performed these duties its office is at an end. It is not to become itself the most terrible invader of the interests it was created to protect, acting the part which the lion acted when he was made king of beasts; nor, except where men are sunk in beastly degradation, will they permit it to usurp and monopolize all the prerogatives which elevate man above the brutes, and make him lord of the lower world. It is to be the servant of the community, and not its master. It is to keep off harm from without, and to preserve order within: not to interfere in any man's business, but sternly to forbid any other man from interfering with it. In short, it is to leave every one untrammelled in the free enjoyment of all his natural rights, to pursue his own best happiness in his own way, so long as he does not violate the rights of another.

Government is a necessary evil. It is for our ignorance, for our folly, and our wickedness that we are shackled with its control; and we submit to it only that it may shield us from the heavier curse, the eternal and deadly warfare which men must wage against one another, if left in a state of total anarchy without the possibility of a common arbiter of differences, or a mutual protector from each others aggressions. Protection being the only object of society, it follows that we surrender to it, for the purpose of preserving our natural rights as nearly unimpaired as conflicting claims will in the nature of things admit, only so much liberty as it is necessary should be relinquished to that end. To give up more, by the division of a hair, would be to counteract so far the very endeavor we are making when we are forming the social compact, to secure the full enjoyment of our natural rights. It needed not therefore the authority of Montes-

quieu, or of Beccaria, to give weight to the maxim, that every punishment which does not arise from absolute necessity—and even every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. The right to punish crimes is founded upon the necessity of defending the public liberty, and is coextensive only with that necessity.

To suppose that any people has entered into a compact giving unlimited powers for all possible purposes to its government would be to suppose an obvious absurdity; yet this is what most governments assume as far as they dare, never admitting any limits to their prerogative except those which are forced upon them by resistance, or the immediate apprehension of resistance. To suppose that limited grants of power are to be used for any other than the purposes for which they were made is almost equally absurd, yet this is the supposition constantly acted on in the practice of almost every government that ever existed.

Whether in entering into the social compact we gave up our lives, to be thrown into the common stock and disposed of as society might will, is a question to be decided with reference to these principles, and it may be thought to be quite settled beyond dispute by the bare statement of these principles. Philosophers and jurists of the highest reputation, have, however, disagreed in the inferences which we should draw from them. Rousseau supposes that in consequence of the social contract between the citizens and society, life becomes "a conditional grant of the state," to be given up whenever the state shall call for it. This theory has the merit of being consistent and intelligible, but it is anti-republican and slavish. It forgets that "the rights and the welfare of individuals," and not

"projects of public aggrandizement," are, as his Excellency has styled them in his address, "the great objects of civil society." Rousseau understood neither the nature of despotism nor the nature of liberty. His system provides no sufficient safeguards for minorities, and individuals, but leaves them exposed to the tyranny of majorities, a tyranny as much to be dreaded, where a wise forecast has not provided strong guarantees against it, as the irresponsible power of a single autocrat. Athens and France, ancient democracies and modern popular revolutions, attest the magnitude and danger of that error which overlooks the happiness of individuals, and views the public aggrandizement as the great design of the association. Robespierre was a sincere and enthusiastic follower of the political system of Rousseau, and, although the philosopher would doubtless have disavowed the excesses to which the principles of his school were pushed by his disciples, the reign of terror will ever be referred to as a proof and an illustration of the mischiefs of uncontrolled and irresponsible power even in the hands of a popular majority, or of a government growing out of, and resting solely upon the popular will. The truth is the people are not only the sovereigns, but they should take care to retain in their own hands, and as individuals, by far the greater portion of their sovereignty; yielding to society, as an equivalent for its protection, only so much power as is necessary to enable it to perform that duty; which grant should be hedged about with the strictest limitations, carefully prescribed, and rigidly, nay sacredly observed.

When we surrendered to society the smallest possible portion of our liberty, to enable us the better to retain the aggregate of rights which we did not surrender, did we concede our title to that life with which our creator has

endowed us? Is it to be conceived that we have consented to hold the tenure of our earthly existence at the discretion, or the caprice of a majority, whose erratic legislation no man can calculate beforehand? While our object was to preserve as little impaired as might be possible, all our rights, which are all of them comprehended in the right to enjoy life, can we have agreed to forfeit that right to live while God shall spare our lives, which is the essential precedent condition of all our other rights? Property may be diminished, and afterwards increased. Liberty may be taken away for a time, and subsequently restored. The wound which is inflicted may be healed, and the wrong we have suffered may be atoned for; but there is no Promethean heat that can rekindle the lamp of life if once extinguished. Can it be, then, that while property, liberty, and personal security are guarded and hedged in on every side, by the strict provisions of our fundamental constitution, that life is unconditionally thrown into the common stock, not to be forfeited in a specific case, agreed upon beforehand at the organization of our society, but in all such cases as the popular voice may single out and make capital by law? Have we entered into any such compact?

The burthen of proof is wholly upon those who affirm that we have so agreed. Let it be shown that mankind in general, or the inhabitants of this Commonwealth in particular, have agreed to hold their lives as a conditional grant from the state. Let it be shown that any one individual, understanding the bargain, and being free to dissent from it, ever voluntarily placed himself in such a miserable vassalage. Let there, at least, be shown some reason for supposing that any sane man has of his own accord bartered away his original right in his own existence, that

his government may tyrannize more heavily over him and his fellows, when all the purposes of good government may be amply secured at so much cheaper a purchase. In no instance can this preposterous sacrifice be implied. It must be shown by positive proof that it has been made, and until this is undeniably established, the right of life remains among those reserved rights which we have not yielded up to society.

It belongs to those who claim for society the rightful power of life and death over its members, as a consequence of the social compact, to show in that compact the express provisions which convey that power. But it cannot be pretended that there are or ever were such provisions. It is argued, as boldly as strangely, that *this right is to be implied from the nature of the compact.* It may seem unnecessary to reply to such an assumption ; but it has often been advanced and for that reason deserves our notice. In point of fact, there is no social compact actually entered into by the members of society. It is a convenient fiction—a mere creature of the imagination—a form of expression often used to avoid long and difficult explanations of the real nature of the relation between the body politic and its individual members. This relation is not, strictly speaking, that of a compact. It is not by our voluntary consent that we become each one of us parties to it. The mere accident of birth first introduced us, and made us subject to its arrangements, before we were in any sense free agents. After we had grown to the age of freemen, and had a right to a voice in the common concerns, what alternatives had we then left? Simply these. Resistance to the social compact, as it is called, under the prospect of producing ruin, confusion, anarchy, slaughter almost without bounds, and finally ending in a

new form of the social compact, much more objectionable than that which had been destroyed, if the resistance should prove successful: should it fail of success, incurring the penalty of treason, a cruel death, to such as have not been fortunate enough to fall in the field of battle. Flight from the social compact, that is to say, flight not only from one's home, friends, kindred, language and country, but from among civilized men, perhaps it may be said from the fellowship of the human race. Or, lastly, submission to the social compact, as we find it, taking the chance of our feeble endeavors to amend it, or improve the practice under it. To this result almost every man feels compelled by the circumstances in which he finds himself; circumstances so strong as to force from an inspired apostle the declaration, though he wrote under the tyrant Nero, a monster of depravity, "the powers that be are ordained of God; whosoever therefore resisteth the power, resisteth the ordinance of God; and they that resist shall receive unto themselves damnation."* With whatever latitude this is to be understood, and there are cases generally supposed to justify resistance to the utmost extremity, it is certain that submission to the existing constitution of society is, in ordinary cases at least, a duty and a necessity also. How then can that be a compact into which we are forced by the irresistible influence of our circumstances, and how can submission be regarded as a voluntary acquiescence, when there is no door open to avoid submission, except such resistance, or such a flight as has been described? It is a palpable folly to pretend that an actual, voluntary compact exists, and they who derive the right to punish capitally from any supposed social compact, must first suppose an agreement which

* Romans xiii. 1.

the facts in the case show was not and never could be freely entered into by the individual members of society; and then from that purely imaginary agreement proceed to draw an implication, also purely imaginary, and which it would be absurd and monstrous to derive from such premises, even if such a general compact as is supposed in arguments like these had been actually formed. To state this theory is sufficiently to refute it, yet it is that which has been most frequently relied on.

But let us carry this examination one step farther. Not only has no man actually given up to society the right to put an end to his life, not only is no surrender of this right under a social compact ever to be implied, but *no man can*, under a social contract, or any other contract, *give up this right to society*, or to any constituent part of society, for this conclusive reason, that the right is not his to be conveyed. Has a man a right to commit suicide? Every christian must answer, no. A man holds his life as a tenant at will,—not indeed of society, who did not and cannot give it, or renew it, and have therefore no right to take it away—but of that Almighty Being whose gift life is, who sustains and continues it, to whom it belongs, and who alone has the right to reclaim his gift whenever it shall seem good in his sight. A man may not surrender up his life until it is called for. May he then make a contract with his neighbor that in such or such a case his neighbor shall kill him? Such a contract, if executed, would involve the one party in the guilt of suicide, and the other in the guilt of murder. If a man may not say to his next neighbor, "when I have burned your house in the night time, or wrested your purse from you on the highway, or broken into your house in the night, with an iron crow, to take a morsel of meat for

my starving child, do you seize me, shut me up a few weeks, and then bring me out and strangle me, and in like case, if your turn comes first, I will serve you in the same way," would such an agreement between ten neighbors be any more valid or justifiable? No. Nor if the number were a hundred instead of ten, who should form this infernal compact, nor if there should be six hundred thousand or seven hundred thousand, or even fourteen millions, who should so agree, would this increase of the number of partners vary one hair's breadth the moral character of the transaction. If the execution of this contract be not still murder on the one side and suicide on the other, what precise number of persons must engage in it, in order that what was criminal before may become innocent, not to say virtuous, and upon what hitherto unheard of principles of morality is an act of murder in an individual, or a small corporation, converted into an act of justice whenever another subscriber has joined the association for mutual sacrifice? It is a familiar fact in the history of mankind, that great corporations will do, and glory in, what the very individuals composing them would shrink from or blush at; but how does the division of the responsibility transform vice into virtue, or diminish the amount of any given crime? The command, "Thou shalt not kill," applies to individual men as members of an association, quite as peremptorily as in their private capacity; and although men in a numerous company may keep one another in countenance in a gross misdeed, and may so mistify and confuse their several relations to it, as that each one may sin ignorantly, and therefore in the sight of the searcher of hearts be absolved from intentional guilt, still that it does not alter the true nature of the act must be obvious, as also that it is equally our duty to

abstain from a social as from a personal crime, when once its criminality is clearly understood.

It is, not, however, from any social compact, either actual or implied, comprehending the whole body of the people, that the practice of putting to death particular members of the community grew up. It was from a compact of the opposite character, the league of the oppressors against the oppressed. "If we look into history we shall find," says Beccaria, "that laws which are, or ought to be, conventions between men in a state of freedom, have been, for the most part, the work of the passions of a few,—not dictated by a cool examiner of human nature, who had this only end in view, *the greatest happiness of the greatest number.*" This principle adopted by Bentham, and made the foundation of his theoretical system of government and legislation, his Excellency considers to be practically in operation in our own institutions. "Our system looks to the people," says the address, "not merely as a whole, but as a society composed of *individual men*, whose happiness is the great design of the association. It consequently recognizes *the greatest good of the greatest number*, as the basis of the social compact."

The leading idea of the American policy is freedom. Other nations have forms of government intended and suited solely to secure the interests of the ruling classes. Here, for the first time in the history of the world, a written constitution was adopted, establishing a government for the security of the rights and liberties of the whole people. This is the first true social compact, if any such compact be in existence, and it should be construed in the spirit in which it was made. Other constitutions have been compacts of aristocracies parcelling out

among themselves their prerogative to plunder and oppress; compacts to take all that could be wrested from the producer, and to guard against his resistance. Ours is a compact which protects whatever we have, or may acquire, and provides for mutual defence against any invasion of the rights of a citizen. And this is all that it aims to accomplish, all that any government can accomplish for the benefit of the people, and more than any other ever yet did effect, for in aiming at other, and unattainable ends, every government, except, let us hope, our own, has failed partially of fulfilling what ought to be its legitimate purpose, and has visited its unhappy subjects with miserable evils, instead of the blessings which it promised.

There is no departure from the proper sphere of government which has been more fruitful in misery than the attempt to sit in judgment on the hearts and consciences of men, and to measure out punishments according to the supposed degrees of moral guilt, instead of punishing merely to protect. It is to this attempt, which assumes to visit upon secret and unascertainable motives that vengeance which is the prerogative of the omniscient judge, which assumes also that infallibility which is equally beyond the province of man, that we owe the fires of the inquisition, the massacres of St. Bartholemews, and all the persecutions for heresy in which the various sects mutually sacrificed each other in hecatombs, with such fatal readiness and zeal, that, for ages, christendom appeared "one vast scaffold, covered with executioners and victims, and surrounded by judges, guards and spectators." It is to the same attempt, always vain and impotent for its intent, though so horrible in its consequences, that we owe all the sanguinary and inhuman penal-

ties which have heretofore disgraced the criminal codes of our own and other nations, as well as those which remain to be abolished by the refined humanity of the present age. Society should at length cease to be vindictive. In fixing the punishment we should weigh, not the ill desert of the criminal, which can in no case be truly and exactly known, and which if known would vary almost infinitely in crimes of the same legal description, but the melancholy necessity of painful precautions against the moral maniac who endangers our safety.

But our prejudices upon this subject are only a portion of that great inheritance of error which have been handed down to us from the feudal system, and from systems, more arbitrary than feudality, which preceded it. These prejudices originated centuries back, when darkness covered the earth, and gross darkness the people; and they ought to have vanished long ago, dissipated by the healing beams of christianity and truth. They have lingered however beyond their time, till the full blaze of light has burst upon them, and is dispelling them, as the sun dissolves the last wreath of mist from the river.

When the favored few governed for their own exclusive advantage the subject many, whom they held to be created out of a different clay, they naturally made their own opinions, comfort, and interest, the sole standard of right and wrong. Possessing such unbounded power, they would have been virtuous beyond human virtue, if they had not signally abused it. Accordingly we find that they sported in perfect wantonness with both the liberties and lives of the people. No wonder that vulgar life was cheap, when the noble could impose laws upon vassals and villains, when he could be tried only by his peers, and when there was little sympathy between the

ruling and the suffering classes. The game laws are only one of the consequences to be expected from such a state of things. There was a time, we are told, when by the law of England the killing of a man was permitted to be expiated by the payment of a fine, while the killing of a wild boar, by one not qualified to hunt was punishable with death. It happened then, so the anecdote has come down to us, that a man charged with killing a wild boar, and put on trial for his life, plead in his defence that he did it by mistake, for that he really thought the beast was only a man. It was from times when the couquerors, who held in military subjection the people they had overrun, thus sacrificed life to their own pleasures or caprices, that its cheap estimate came down to a later stage of society, when the monied aristocracy wasted it as lavishly and unscrupulously for the protection of property from even slight aggressions, as ever the iron clad barons that preceded them, had for the protection of their privileges. The humanity of our day has made these laws for the most part in most countries, inoperative, where they have not been repealed; but it is difficult to divest us so far of the impressions they have left behind them as to see the punishment of death in its true light, a mere remnant of feudal barbarity. We are apt to think, so great is the reform already made in this respect, that we have gone far enough; and our conservatives cling to the surviving instances of this abuse, with as ardent attachment as the crown lawyers, in more countries than one, did to the practice of torture, when philanthrophy and philosophy waged a successful warfare against that characteristic vestige of the wisdom of antiquity. This claim of right, however to put to death, implies the aristocratic contempt for mere naked human-

ity, which once was universally prevalent through the law making classes. When the feeling is entirely extinct, we may hope that the claim itself will be abandoned. It has no place in a social compact founded in principles of equality.

There remains one ground on which this right is sometimes rested—the right of self defence. But this cannot give the right to put to death, lest he might possibly repeat the crime, one who has once committed a murder, and in no other case than murder does the argument apply. You cannot defend the victim of the crime, for he is gone already. To put to death the criminal because you have strong reason to suspect he might be guilty of the same offence again under similar circumstances, would be to punish, not a crime, nor even the intention to commit it, but a suspected liability to fall under future temptation, which may or may not assail him, and which he may be effectually precluded from, if society so wills. No man has agreed that for the purpose of self-defence, society may seize him and put him to death, to prevent others from following his example, or to prevent him from repeating it; neither is this ground of self-defence sincerely believed to be sound by the community, or any considerable portion of it, for if it were, we should execute the mono-maniac who evinces a disposition to kill, yet the proposition to do so would be rejected with unanimous indignation, even after he had committed more than one murder. But it is more necessary to defend ourselves against such a man, inaccessible to the ordinary motives of hope and fear, the avenues of whose heart are closed against the approaches of repentance, than against any other murderer. Yet we do not hang the maniac. Some other feeling then

must actuate us, other than the desire of self-defence, when we consign the murderer to the gallows.

Indeed, how can it be pretended that death is a necessary measure of self-defence, when we have prisons from which escape is barely possible, and when tenfold more of the most dangerous criminals now go wholly unpunished from the repugnance of witnesses, jurors, judges, executive magistrates, and the public, at capital punishments, than could ever make their way from prisons, such, and so guarded, as the practical science of the present day can construct for their safe keeping. However it might be in a state of imperfect civilization, among us, the right of self-defence furnishes no foundation whatever, much less any solid basis, upon which to establish the right to take away life.

Let it not be said, that these are mere theoretical speculations of no practical importance, for, that whether the right be or be not clearly made out by abstract reasoning, we might safely trust our lives to the wisdom and the mercy of society. That our fellows would feel the responsibility under which they must act, and would take away the life which was placed at their disposal only under the pressure of the most urgent necessity: that, therefore it may be fairly presumed, without much evidence, that in entering into the social compact we gave the power of life and death to the body politic. All history contradicts this too flattering view of human nature. Power is to ambition what wealth is to avarice. Instead of satisfying the desire, it creates an insatiable craving for more. The disposition of power to arrogate to itself more power, has been exemplified in the career of every government since the world begun. This naturally becomes the guiding and the governing principle of

those in whose hands power is lodged. Opposition to this tendency in our own institutions is the criterion and the substance of democracy. Governments, however wisely framed and balanced, will strengthen themselves till they are too strong for liberty, unless they have much virtue within, and firm and constant checks from without. Without these restraints power pursues the law of its nature. In its course it swells and grows like a snow ball, till it accumulates to the magnitude and moves with the ponderous momentum of an avalanche.

The fundamental article in the American political creed is, that governments ought to be strictly confined within their proper sphere. The propensity to exercise power, results from the passions which impel the holder to increase it. Temptation to abuse it will arise, too strong for human frailty, where it is suffered to be accumulated beyond the absolute necessity for entrusting it. There is no power more flattering to ambition, because there is none of a higher nature, than that of disposing at will of the lives of our fellow-creatures. Accordingly, no power has been more frequently or more extensively assumed, exercised and abused. When we review the past, history seems to be written in letters of blood. Until within a very short period, the trade of government has been butchery in masses, varied by butchery in detail. The whole record is a catalogue of crimes, committed for the most part under legal forms, and the pretence of public good. In church and state it is the same ; this power was not given to rust unused. A philosopher has sketched in a few words a picture, which is sufficient without further illustration : " the avarice and ambition of a few staining with blood the thrones and palaces of kings ; secret treasons, and public massacres ; every noble a tyrant over the

people ; and the ministers of the gospel of Christ bathing their hands in blood, in the name of the God of all mercy." That such scenes are no longer to be witnessed must be attributed to changes similar in principle and tendency to the total abolition of Capital Punishment. It is because the powers of governments and of the few have been greatly abridged and restricted, and particularly the very power in question. It is because the rights of the many, and of individuals have been better ascertained and secured, and especially the right of life. It is because the standard of morality has been raised, and the occurrence of the greatest crimes prevented, by restoring, in some good degree, the sanctity of human life, not so much in the letter of the law as in public opinion, which decides the spirit of the law. Let us complete this blessed reformation by pushing onward in the same direction which experience has already sanctioned ; but let us not vainly imagine that the smallest portion of a power, unnecessary, not clearly to be justified, terrible in its most discreet and sparing use, but capable of shrouding the whole land in mourning by a single abuse, may be safely trusted to any fallible government, when by looking back but a century or two we may see all Christendom groaning under its abuse, the soil red with carnage, and a never ending cry of innocent blood going up to heaven from thousands and tens of thousands of the wisest and the best, expiating under the hand of the executioner those virtues which tyrants hate and fear.

Not only are the general nature and purpose of government such as have been described, but it is argued that they are expressly recognized in our constitutions, all of which create governments intended to operate only within limited spheres, for specified objects, and with specified

and rigorously restricted powers. The tendency of power to enlarge itself indefinitely was well understood by their founders and in many respects wisely guarded against —though not so fully as to supercede the necessity of additional safeguards and faithful vigilance. By the constitution of the United States the people intrust to the federal authority certain granted powers, expressly reserving all others, because they would not relinquish unnecessarily the minutest portion of their freedom. In our own ancient Commonwealth "we are secured in the amplest enjoyment of the blessings of government, with the *smallest admixture* of its inseparable evils. The government of the state is a pure democracy," as his Excellency has so justly remarked. "Having rejected and cast down the pillars of arbitrary government, we have laid the cornerstone of the social edifice on the intelligence of the people." Every citizen is "LEFT WITH THE LEAST PRACTICABLE INTERFERENCE FROM THE LAW." These philosophical views which his Excellency entertains of the spirit of our institutions are abundantly sustained by the language of that fundamental law on which they rest. The constitution of Massachusetts begins with promulgating in its first sentence the general theory of government which has been laid down. "The end of the institution, maintenance, and administration of government," says that celebrated instrument, "is to secure the existence of the body politic; to protect it, and to furnish *the individuals who compose it*, with the power of enjoying, in safety and tranquility, *their natural rights, and the blessings of life.*" It is no part of its end, then, to surrender, or to take away any natural right of an individual, much less the last and dearest, or to debar him not only from the blessings of existence, but from life itself. And why "protect the

body politic?" Simply as means to the great end; to protect the natural rights of the individuals who compose it, for without this the body politic would be a curse instead of a blessing. To derive one lesson more from the same store-house of political wisdom and truth—the reason there assigned why laws should be equitably made, impartially interpreted and faithfully executed, is, "*that every man may, at all times, find his security in them.*" Not that any man may, at any time, be liable to be sacrificed for the supposed benefit of other men, nor that a majority should exercise vengeance upon any man because he has been a sinner. The first article of the declaration of rights reckons the right of enjoying and defending their lives and liberties, and that of seeking and obtaining their own safety and happiness, among those natural, essential, and *unalienable* rights which are common to all mankind. It is impossible then that it should have constituted any part of our compact to alienate the unalienable right of enjoying and defending life. This right may be abridged, by the iron rule of stern necessity, when it comes in direct conflict with the same right in another, but, according to our constitution, it can never be alienated. Let it not be said our constitution does not forbid capital punishment; for neither does it, by that name, forbid slavery, or the whipping post, or the pillory, or mutilation, or torture, yet all these are confessedly contrary to the spirit of the constitution. The grand, the comprehensive principle is there. The sages who proclaimed it, before the world was ripe to realize it in all its bearings, left it, unavoidably left it, to the wisdom and humanity of their posterity to receive its full application in all its important consequences. The sublime truth that all men are by their birthright free and equal, had been asserted for some years by

Massachusetts, before the non-existence of slavery within the Commonwealth was adjudged to follow as a necessary corollary from that dogma. The whipping-post, and th pillory survived. for a period, the constitutional prohibition of *cruel and unusual punishments.* They have disappeared, and the gallows, which is more unusual than either of those barbarities had been, and infinitely more cruel and revolting, must soon follow in their train. After the reformation shall have been accomplished, mankind will look back with astonishment at its tardy progress. They will be unable to comprehend how or why it was delayed so long.

It is in these particulars, features indeed more striking than any other, that our constitutions are peculiarly American and purely democratic. The great dividing line between the friends of arbitrary power and the friends of constitutional freedom, generally has been, and for the most part will be, between those who wish by wholesome limitations originally imposed. and by a strict construction of them, to confine governments to the few objects which have been specified, and to leave the people otherwise individually free to govern themselves, and those who by a lavish grant of power originally, and a broad latitude of interpretation, and a free use of implication, would enable the government to control and regulate every action, would make it an engine for the aggrandizement of the few at the expense of the many, like most of the governments of the old world. Our constitutions intend governments, for freemen, empowered only to extend over individual rights the broad ægis of the public protection, when individual strength is insufficient to be relied upon. Their doctrine is to interfere only when interference is necessary, and only so far as it is necessary: whence it follows that

punishment is to be justified by necessity, that it is to be cautionary not retributive, and that its only rightful measure is the necessity by which it is called for. Government should be our presiding genius, ever near us and around us to avert all evil from us; mildly, but firmly, arresting the hand that would do us harm, but in all else, so far as may be, unseen and unfelt, leaving us with our unrestricted energies to work out, in our own way, our own highest happiness.

The justice of these views is in some degree corroborated by observing that such is the constitution of the divine government. Having the power to dictate and control without an effort the totality of human life down to the minutest thought as well as motion, looking with an all seeing scrutiny through both the motives and the consequences of every act, judging with an all wise discretion, and knowing with a perfect knowledge what is right and best for us under all possible circumstances, it still leaves free the human mind to choose, the human will to act, for good or evil, under its ultimate responsibility, having first proclaimed a commensurate retribution, and a retribution only commensurate, for each infraction of the moral law.

And what is the moral law? A few grand and governing principles of right and wrong—simple, and so easily recognized that it is hard to tell whether they be not instructive; broad and universal in their application. The moral law enacts that you should do to others as you would that others should do to you. It forbids only that which would injure another. If you disobey you will suffer the consequences of your misconduct, which, in the wise ordination of Providence, naturally flow from it: but the punishment is never disproportionally greater than the offence, on the contrary, so far as it falls under human ob-

servation, it is always less than the desert of the offender, and its object appears to be not to crush but to reform him. How opposite is the spirit of this law to those interminable interferences with private right, those odious shackles upon individual freedom, without an object and without a pretext, and those revengeful and unnecessary punishments, the offspring of unhallowed passions, which make up so voluminous a portion of the statutes of most civilized nations. Yet human governments, though weak and fallible, acting upon imperfect knowledge, and often from partial or unworthy views, while they admit that vengeance belongs to God alone, would regulate the distribution of wealth, dispense favors to some, impose restrictions on others, prescribe the conditions and the manner of every action; and when by the artificial state of society which they have produced, and the unnatural constraint to which they have endeavored to subdue its members, they have multiplied crimes which but for them would not have existed, and confounded all the distinctions of a rational and just morality, they then punish what is not morally wrong because they have forbidden it, and accumulate punishment upon punishment, with unavailing and gratuitous cruelty, whenever moral guilt affords a plea for retributive infliction of misery upon those already steeped in wretchedness.

Beccaria sums up the result of his enquiries upon the subject of crimes and punishments in this theorem: "That a punishment may not be an act of violence against a private member of society, it should be public, immediate and *necessary; the least possible in the case given;* proportioned to the crime, and determined by the laws." Under such a rule society might keep within

the boundary of its undisputed rights, and refrain altogether from inflicting the punishment of death.

These remarks upon the abstract question of right in this case, are submitted by your committee as the fairest statement they have been able to draw up of the argument against the right denied. They repeat that they submit it without any expression of opinion how far the reasoning may be sound or otherwise. They thought it due to the number and excellent character of the citizens who profess these sentiments, to communicate them to the Legislature, and through them to the public. If correct, they will have their proper influence; if erroneous, they will have an ordeal to pass through which will expose and refute them. Your committee have gone the more at large into the argument, because they know of no work in common circulation, from which one may collect even a tolerable idea of it, while at the same time, and from very imperfect statements, or rather hints, it is every where the topic of eager discussion. Having drawn an outline, without pretending to exhaust the subject, they leave it with the House, and pass to the consideration of the expediency of capital punishments, supposing society to possess the abstract right.

Upon this branch of the enquiry, your committee have no hesitation in expressing the most decided conviction, that whatever may have been the case in a state of imperfect civilization, or whatever may be the duty of another government with regard to certain other crimes not falling within the jurisdiction of this Commonwealth, questions not necessary to be discussed here, it is inexpedient, in this state, at this time, to provide by law for the punishment of death. In their opinion, this punishment is in no case necessary for the preservation of

property, or of honor, or of life, or of good government. And if it be not necessary, certain they are, that no member of this House would wish that it should be wantonly or gratuitously inflicted.

There are three crimes against property punishable with death by the laws of this state, arson, burglary, and highway robbery. The reason for so distinguishing these three crimes is usually alledged to be, that they, in a peculiar manner endanger life. This is the most preposterous reason that can be given for affixing to them a punishment which renders them much more dangerous to life than they would be under any other modification of the law. It would almost seem as if the law had been first framed in solemn mockery, professing to guard life with jealous tenderness, yet in fact intending not to save life but to kill. In case there be any witness of either of these crimes, the law prompts the criminal not to stop short at an aggression upon property, but tempts him to go on to the commission of murder; and it tempts him to do this as he values his own life. It says to him in plain and intelligible language, you are now face to face with your mortal enemy. One of you must die. It is for you to choose whether the doom shall fall upon your own head, or upon that of your adversary. Kill him, or he will kill you. If you, already plunged so deep in crime, through tenderness of conscience, choose to make yourself a martyr by the most cruel and ignominious death, and without the sympathy and admiration of his fellows, which supports the martyr,—if you choose to throw away your own life, for the sake of the life of this man who stands before you, obey the call of duty, and in return, I, the law, will lay my hand upon you, and drag you to a certain execution; but if you prefer security, both of

your person and character, to the impending destruction and disgrace, go on boldly, imbue your hand in the blood of your fellow, and you will escape my grasp: your crime will be shrouded in darkness impenetrable to human eyes: this is the voice of the law. Should the law hold this language to any man? More especially, should the law hold this language to a man who has already shown his extreme frailty by yielding to a previous temptation, not so strong as the love of life, with which the law tempts him? We are all, as weak and erring creatures, taught to pray that we may not be led into temptation; is it right, is it expedient, by our solemn enactments, to lead into the most terrible temptation that can beset him, to deliver over to the power of evil, the man who has already entered the path of vice, but who would never fall into the deepest abyss of guilt, if the strong arm of the law did not thrust him over the precipice? There is matter for profitable reflection in these queries, and your committee recommend them to the most serious attention of every member of this House.

There is nothing in the nature or history of either of these crimes to make it expedient that it should be punished with death.

The crime of arson is the malicious and wilful burning of a dwelling-house. The punishment of arson was death by the ancient Saxon laws, and in the reign of Edward I., this sentence was so executed as to be a kind of retaliation, for incendiaries were burnt to death. In the reign of Henry VI., it was made, under some circumstances, to amount to high treason. It was afterwards made felony with the benefit of clergy. In the reign of Henry VIII., it was made capital again, and so continues till this time in England. It was made capital in Massachu-

setts by the colony law of 1652, and continued so by re-enactments in 1705, 1785, and 1805, though the description of the offence was from time to time somewhat varied. In 1652, it was a capital offence for any one over 16 years of age, feloniously to set on fire any dwelling-house, store-house, or meeting-house. In 1705, it was enacted "that if any person, of the age of 16 years and upwards, shall willingly and maliciously, by day or night, burn the dwelling-house of another, or other house parcel thereof; or any house built for public use; any barn having corn, grain, or hay therein; any mill, malt-house, store-house, shop, or ship; the person so offending, as aforesaid, shall be deemed and adjudged to be a felon; and shall suffer the pains of death accordingly." The severity of this law was somewhat mitigated in 1785, by confining the capital offence to the burning of the dwelling-house of another, and that between the setting and rising of the sun. The law of 1805 confines the capital offence to the night time, which is understood to be between the shutting in of the twilight at night, and its earliest appearance in the morning. By the law of 1830, a further mitigation is found, in the provision, that if it shall be proved that there was no person lawfully in the dwelling-house so burnt, the punishment, instead of death, shall be imprisonment in the state prison for life. A similar provision is contained in the Revised Statutes. Thus have we gone on ever since 1705, narrowing down the crime of arson to smaller and smaller limits. The reasons which justified the steps that have been taken call loudly for yet another. This crime must cease to be capital in any case. Unless the signs of the times mislead us, the people of Massachusetts are already ripe for the change.

To justify the severity of the punishment of this offence, it is described, both here and in England, as being one of the most malignant dye, not only as against the right of habitation, which is acquired by the law of nature, it is said, as well as by the laws of society, but because of the terror and confusion which necessarily attend it. The gradual lessening of the extent of this crime, and the mitigation of the penalty, in most cases which formerly fell within the definition, indicate doubts in the minds of the community of the correctness of that reasoning, which places it upon a level with wilful murder. Your committee would propose a broad distinction, as will be seen, between crimes of so different a nature as these, which are now confounded under the same punishment. As the law now stands, not only he who wilfully and maliciously sets fire to the dwelling-house of another, so that it should be burnt in the night time, there being any person lawfully therein, but also he who wilfully and maliciously sets fire to the most insignificant building, intending only to burn such building, if contrary to his expectation and intention, a dwelling-house is in consequence burnt, as before expressed, is equally liable to the same punishment with the wilful murderer. So also are all those who counsel, hire or procure the offence to be done, or are otherwise accessary thereto before the fact.

Is this law in accordance with public opinion, and would the public approve its execution to the letter, as cases may arise? His Excellency remarks, that "the law must be respected as well as obeyed, or it will not long be obeyed. * * * A state of things, which deprives the executive of the support of public sentiment, in the conscientious discharge of his most painful duty, is much to be deplored."

How far is this law respected, obeyed, and, with the support of public sentiment enforced by the executive? There has probably, hardly been a month for many years, when the crime of arson has not been committed in this Commonwealth. There is reason to believe that it is often committed many times in a night, for several nights in the same week and for weeks together, within the limits of one city or town. There has been but one execution for the crime of arson in Massachusetts within a period of more than thirty years. Stephen M. Clarke, a lad but little over seventeen years of age, was for setting fire to a building in Newburyport, put to death in Salem on the 10th of May, 1821. Such was his horror of death, that it was found necessary, amidst his cries and lamentations, actually to force him from his cell, and drag him to the place of execution. It is much to be doubted whether any person of ordinary sensibility and reflection could have viewed, amidst the parade of soldiers and the sound of martial music, the officers of justice, overcoming with difficulty their natural repugnance to such a task, and dragging with violence a fellow-being, a youth, a mere miserable and deluded boy, to the gallows, there to put him to death in obedience to the laws, without in his heart execrating those laws which required the exhibition of such a horrid spectacle. As much as the crime of the sufferer is abhorred, the law that condemns him to death is at least equally detested by the majority of the spectators. Are those who look on with abhorrence to be charged with advocating and palliating crime? It is among them that the fewest crimes occur. That numerous sect of Christians, the friends, sometimes called quakers, reprobate with one voice this kind of punishment; but do they advocate or tolerate crime? On the contrary, high crimes, like that

under discussion, are almost unknown among them. Their voice has, from the time their sect originated, been uniformly and consistently lifted up against all capital punishments; not because they are unwilling that the guilty should be adequately punished, but because they believe it to be an act of wickedness and a violation of the principles of the religion which they profess, to take away the life of one of their fellow-creatures. Are not the members of this sect as free from vice and crime, and as moral, pious and exemplary as any other sect of Christians of equal numbers? It cannot be denied, and this fact shows beyond question or cavil, that the scruples they entertain upon this subject are not the offspring of a lax morality, as is sometimes uncourteously insinuated; nor do they tend to produce a lax morality, as is more frequently and boldly asserted. The observation of the world has shown, and our own so far as it goes has invariably confirmed it, that the effect of a capital punishment has no tendency to diminish the crime punished. The execution for arson, of which we have spoken, was almost immediately followed by a considerable number of attempts to commit the same crime, in the same town, where Clarke had committed it. The expectation of such a punishment, about to be inflicted if the law takes its course, seems to have had no influence for several weeks past in the city of Boston, unless it has made incendiaries more active, for since the conviction of two criminals now under sentence, the number of attempts to kindle fires in the night time has been uncommonly large, including the immediate neighborhood of the prison in which the convicts are confined. A conviction and sentence of death in the case of John Wade, for the crime of arson, has lately occurred at Dedham, and it is a subject

of general congratulation that the community were saved from the evils attendant upon a public execution, by the commutation of his punishment, by his honor, lately lieutenant governor, and the council, to imprisonment for life.

The severity of this law totally defeats its object. Often is there strong evidence in the neighborhood where a conflagration has occurred, showing that it was designedly kindled, and tending to fix the charge upon the incendiary. Yet no complaint is made, no investigation takes place, because the hanging, if it should end in that, would be a greater evil than the fire. When a trial is had, which but seldom occurs, all possible latitude is given to the circumstances which will take the case out of the present narrow limits of arson. From these and some other causes, the law is practically obsolete, for of the many thousand instances of arson committed in the last thirty years within this state, only one has been punished according to law. Is it not a most heinous injustice thus to measure out to one victim that retribution which is spared to all others in like kind offending? The law might as well be ex post facto, as to be unknown; and it might as well be unknown to him who suffers under it, as to be known to him as having been a dead-letter. In that case may he not justly ask, why should that vengeance which has slumbered for so many years, over so many multiplied transgressions, awake at last to wreak itself on me alone? Instead of being warned beforehand that death would be my punishment, was I not assured by the almost uniform result of similar cases, that I should not be put to death? To this course there has been but one exception for a whole generation. That the laws should be just, they should not only be equal in their provisions, but equally executed, impartially executed. But

could every author of an incendiary attempt be arrested, and convicted, public sentiment would not justify their lawful punishment. The law is not enforced because it is not in accordance with the spirit of the age, the temper of the community, the judgment of our best and wisest men. It ought not to be enforced. Therefore it ought to be repealed.

The remarks upon the crime of arson will, in a great measure, apply to that of burglary. The common law definition of a burglar is, one that breaks and enters, by night, into a dwelling house with intent to commit a felony. Burglary was first made capital in England, as to the principal only, in the reign of Edward VI, and as to abettors and accessories before the fact, in the fourth year of William and Mary. It was not a capital offence by the colony law of 1642, until after two convictions, but if the culprit should commit the like offence the third time, he was then to be put to death as incorrigible. This law was re-enacted in 1692 under the Province charter. In 1715 it was made capital upon the first conviction, and continued so, on a revision of the law, in 1770, and in 1785. In 1806 the law was altered so as to make burglary a capital crime only in case the offender shall be at the time of his breaking and entering, armed with a dangerous weapon, or shall commit an actual assault upon any person lawfully within the house. This provision is also recognized in the revised statutes. Under this modification of the law, that is to say, for the last thirty years, there has been no one executed for the crime of burglary. Yet not a year has passed in which this crime has not often been committed. Every man has heard of numerous instances in his own neighbourhood, and in many of them abundant proof might easily have been collected, if public opinion

had demanded a sacrifice to the violated law. But the execution of the law in any one of these instances would have been an outrage upon the better feelings of the community, which are much in advance of our sanguinary legislation. The practice under this barbarous law is brought to conform with the spirit of the age by a sort of casuistry which ought by no means to be encouraged, much less rendered necessary to avert a public calamity. The aggravating circumstances, making the crime capital, will, if possible, be concealed by the complainant and witnesses, or will be overlooked by the jury. Although, through the natural evasions so easily resorted to, there may never be any capital conviction under the law, yet it ought not to be permitted to remain upon the statute book unrepealed, when it is well understood to be the occasion of prosecutors, witnesses and jurors, and sometimes it is supposed even judges, forbearing to notice circumstances which if fully considered would certainly lead to a capital conviction; and not unfrequently causes the entire acquittal, as is believed to have happened in some recent cases, of those who are really guilty, and conclusively proved so, if all the proof known to exist out of the court should be fairly heard upon the trial. Witnesses, though sworn to tell the whole truth, are strongly tempted to suppress material circumstances, and give the most favorable coloring, that they can by any ingenuity justify to their consciences, to the testimony which they give. Others, knowing important facts, conceal them, that they may not be called as witnesses. Prosecuting officers embarrassed between their own sense of right and wrong, and the dictates of the law, omit, if possible, those particulars in the description of the offence which make it capital. The jury, sworn to find a verdict according to

the law and to the evidence, are prompted, by their horror at the result to which the law and the evidence would lead them, to pervert the true meaning of the law, and to put the most forced interpretations upon the testimony, or draw from it inferences improbable in the highest degree, and even impossible. Sometimes they are driven to revolt against the law, shut their ears against evidence, and perform the part which humanity seems to them to to dictate, rather than what the law imperatively requires of them. The jury, believing in their hearts that the offence was committed in the night time, that the offender was armed with a dangerous weapon, that there was a person lawfully within the house, may refuse to find one or the other of these facts, and so save the culprit from the operation of a law which they cannot approve. In England cases like the following often occur in trials for crimes not capital among us, but which serve to illustrate the effect of the motives alluded to upon the minds of jurors. A woman was indicted for stealing in a dwelling-house, two guineas, two half guineas, and forty-four shillings in other money: she confessed the stealing of the money, and the jury found her guilty; but as the stealing of such a sum would be punishable with death, they found the value of the money to be thirty-nine shillings only, which saved her from the sentence of death. Another female was indicted for stealing lace, for which she had refused to take eight guineas, offering it for sale for twelve. The jury who convicted her of the theft, found the lace to be worth thirty-nine shillings. Two persons indicted for stealing the same goods privately in a shop, five shillings stolen in this manner making the offence capital, one of the prisoners was found guilty of thus stealing to the value of five shillings, and the other to the value of four

shillings and ten pence. A volume might be compiled of examples similar in principle to these. Their demoralizing tendency cannot be kept out of sight. If a conviction should be had and sentence passed for the crime of burglary in this state, is it not to be apprehended that the Executive must sign a warrant for an execution which would shock an enlightened public sentiment, by making a mere violation of the right of property the price of human life, or that by an exercise of the pardoning power, he must satisfy those disposed towards crime, that the law holds out a threat which there is reason to know will never be fulfilled. Indeed, may not this inference already be fairly drawn from the fact that there never has been an execution for this offence under the existing law.

By the laws of Massachusetts, principals in the second degree and accessories before the fact, which descriptions may embrace persons of various degrees of guilt, are put upon the same footing as principals in the first degree. A person who has armed himself with a sword or a loaded pistol, for a justifiable purpose, and who being thus armed, shall in the night time lift the window of an inhabited house, far enough to insert his hand, and steal therefrom the most insignificant article of property, has committed a crime by which his life is forfeited, and so have those who have stood by abetting the act, or who counselled it to be done. Your committee are not ignorant of the high wrought description of this crime usually given to justify its horrible punishment. It is said to be very heinous, partly on account of the terror which it occasions, and partly because it is a forcible invasion and disturbance of the natural right of habitation. Admitting all this in its fullest extent, wherein do we find a sufficient reason for taking away the life of the offender? How much dearer

rights, in refined society, are invaded, for the invasion of which the laws inflict no penalty whatever, but leave the injured party to the miserable remedy of an action for damages, to be estimated in dollars and cents. Are there no terrors far surpassing those occasioned by the burglar which the laws suffer to go unpunished? Shall the image of God be marred and destroyed by the hand of man, because he who is doomed to destruction has put his fellow man in fear, by disturbing his right of habitation, and laying his hand upon perhaps the most worthless of his goods? The committee make these suggestions not to extenuate crime, but to awaken attention to the true character of our criminal laws, that under the false notion of just and necessary punishment, we may not involve ourselves in the guilt of punishments unjust, unnecessary and disproportioned to the offence. Let the public attention be directed to this subject, and there will be an earnest enquiry, what is just and right; this alone will ensure that change in our laws which is called for by the existing state of civilization among us. Knowledge, reason and reflection have made all the difference which exists between the savage of the forest and the refined and enlightened inhabitant of Massachusetts. They seem hardly to have been applied at all to the due apportionment of punishments, in which particular reform creeps tardily behind the general progress of society. The power of improvement cannot yet be exhausted; and it well becomes a community that has secured to itself liberty of thought and of action, to inquire into the state of its advancement, and to adapt its legislation to this state by such alterations and amendments of the laws as the spirit of the age requires.

It has been said, but it is the language of unreflecting

levity, that the criminal convicted of a capital offence, under our laws, is generally depraved and worthless, and that, therefore, the sacrifice of a few such lives is of very little consequence to society, and it is not an object fit to engage the attention of the government of a great state, even if these laws might be repealed without injury. It is impossible that any member of this legislature can entertain so inhuman a sentiment. Felons, however fallen, still are men, and have the better title to commiseration the more deeply they are sunk in guilt. If these wretches were princes, says Goldsmith, there would be thousands ready to offer their ministry; but the heart that is buried in a dungeon is as precious as that seated on a throne. Suppose that one only may be caught up from the gulf of vice, misery and perdition. and restored to repentance, virtue and usefulness, this would be gain enough to reward all the exertions that may be made to effect the reform, for there is upon earth no gem so precious as the human soul.

In this view of it, no one will allege, that too much importance is attached by your committee to the subject referred to them. Every one will agree with Beccaria, that the question, whether the punishment of death is really necessary for the safety or good order of society, is a problem which should be solved with that geometrical precision, which the mist of sophistry, the seduction of eloquence, and the timidity of doubt are unable to resist. Every one can understand the feelings of that extraordinary man, when, submitting to his contemporaries and to posterity views so much in advance of the age in which he lived, he consoles himself for the coolness with which they are at first received with the reflection, "if by supporting the rights of mankind, and of invincible truth,

I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or of ignorance equally fatal; his blessing, and his tears of transport, will be a sufficient consolation to me for the contempt of all mankind."

In this train of general remark, and before passing to the particular consideration of the remaining capital crime against property, your committee may be pardoned if they introduce the substance of the observations of Dr. Goldsmith against punishing capitally aggressions upon property. They are full of wisdom learned in the school of nature, and expressed with the beautiful ease which characterises all his writings. It were highly to be wished, says the doctor, that legislative power would direct the law rather to reformation than severity; that it would seem convinced that the work of eradicating crimes is not by making punishments familiar. Then, instead of our present prisons, which find or make men guilty, which enclose wretches for the commission of one crime, and return them, if returned alive, fitted for the perpetration of thousands,—we should see as in other parts of Europe (had he lived at the present day, he would have referred rather to America,) places of penitence and solitude, where the accused might be attended by such as could give them repentance if guilty, or new motives to virtue if innocent. And this, but not the increasing of punishments, is the way to mend a state: nor can I avoid even questioning the validity of that right which social combinations have assumed of punishing capitally offences of a slight nature. Natural law gives me no right to take away the life of him who steals my property; as by that law the horse he steals is as much his property as mine. If then I have any right, it must be from a com-

pact made between us, that he who deprives the other of his horse shall die. But this is a false compact; because no man has a right to barter his life any more than to take it away, as it is not his own. And beside, the compact is inadequate, and would be set aside even in a court of modern equity, as here is a great penalty for a very trifling convenience, since it is far better that two men should live, than that one man should ride. But a compact that is false between two men, is equally so between a hundred and a hundred thousand; for as ten millions of circles can never make a square, so the united voice of myriads cannot lend the smallest foundation to falsehood. It is thus that reason speaks, and untutored nature says the same thing. Savages that are directed by natural law alone, are very tender of the lives of each other; they seldom shed blood but *to retaliate* former cruelty.

Our Saxon ancestors, he continues, fierce as they were in war, had but few executions in times of peace; and in all commencing governments, that have the print of nature still strong upon them, scarce any crime is capital. It is among the citizens of a refined community that penal laws, which are in the hands of the rich, are laid upon the poor. Government, while it grows older, seems to acquire the moroseness of age; and as if our property were become dearer in proportion as it increased, as if the more enormous our wealth, the more extensive our fears, all our possessions are paled up with new edicts every day, and hung round with gibbets to scare every invader.

I cannot tell whether it is from the number of our penal laws, or the licentiousness of our people, that this country should show more convicts in a year, than half the dominions of Europe united. Perhaps it is owing to

both; for they mutually produce each other. When by indiscriminate penal laws a nation beholds the same punishment affixed to dissimilar degrees of guilt, from perceiving no distinction in the penalty, the people are led to lose all sense of distinction in the crime, and this distinction is the bulwark of all morality: thus the multitude of laws produce new vices, and new vices call for fresh restraints. Instead of contriving new laws to punish vice, instead of drawing hard the cords of society till a convulsion comes to burst them, instead of cutting away wretches as useless, before we have tried their utility, instead of converting correction into vengeance, it were to be wished that we tried the restrictive arts of government, and made the law the protector, not the tyrant of the people. We should then find that creatures whose souls are held as dross, only wanted the hand of the refiner; we should then find that wretches now shut up for long tortures, lest luxury should feel a momentary pang, might, if properly treated, serve to sinew the state in times of danger; that as their faces are like ours, their hearts are so too; that few minds are so base that perseverance cannot amend them; that a man may see his last crime, without dying for it; and that *very little blood* will serve to cement our security. This last remark your committee would amend, for they believe that mutual benefits, and not mutual blood-shed, form the best cement of our security.

There is one other capital crime against property to be considered. In England, highway robbery was enacted to be a capital offence only when committed in or near the king's highway, in the twenty-third year of the reign of Henry VIII. In the fourth year of William and Mary it was made capital in all other places also. Robbery

was first made capital in Massachusetts by the colony law of 1642, but not upon a first or second conviction. If after having been twice tried, convicted and punished, he should be tried and convicted a third time, he was then deemed incorrigible, and was sentenced to death. Before 1642 this crime would have been punished according to the law of Moses, and although the Jewish code has numerous capital offences, yet robbery is not among them. In 1711, by the province law, it was made capital on the second offence; and, at last, in 1761 on the first conviction. In 1785, upon the revision of the last mentioned statute, the capital punishment was continued; but in 1805, another revision of the criminal laws taking place, it was provided that robbery should be punished by solitary confinement not exceeding two years, and confinement afterwards to hard labor for life. In 1819, it was enacted "that if any person shall commit an assault upon another, and shall rob, steal and take from his person * * * * such robber being at the time of committing such assault, armed with a dangerous weapon, with intent, if resisted, to kill or maim the person so assaulted and robbed, or if any such robber being armed as aforesaid shall actually strike or wound the person so assaulted and robbed," he shall, together with such as aid and abet him, or are accessories before the fact, suffer the punishment of death. This statute still continues in force. Within about three years after its enactment, three persons suffered the penalty. The first of these was Michael Martin, who was executed at Cambridge, Dec. 20, 1821, the history of whose life and adventures, compiled and published in a sizeable volume, did more injury to the morals of the community than will be countervailed by all the executions that will ever occur under the pro-

visions of this last statute of death. In about three months after Martin, Samuel Clisby and Gilbert Close were executed for robbery. Thus, this statute very soon obtained, if it did not create, victims. Some years afterwards, Theron Cheney, a boy of twelve or fourteen years of age, attacked another boy about the same age, and robbed him, being armed with a dangerous weapon. He was convicted and sentenced to death, but in consideration of his age, and other circumstances, his sentence was commuted to imprisonment for life. In the state prison he became a good boy, and was pardoned, and restored to society, to virtue and to usefulness. He acquired a good reputation in the neighborhood where he lived, and died a christian death among his friends in March 1835. While the severity of the law, when executed to its utmost extent, was almost immediately followed by repeated violations of its provisions, no man can show any other than the best of consequences from this interference of executive clemency: neither have your committee been able to discover any evidence that this crime was more frequent during the fourteen years between 1805 and 1819, while it was not capital, than it has been for the sixteen years since it was made capital. There is reason to believe that it has been quite as frequent during the latter period as the former, notwithstanding the general prosperity of the country, and the great increase of benevolent and highly successful efforts to promote temperance, good education and morality. Indeed, we can find no indication that this crime was more common for the one hundred and thirty-three years when the first offence was not capital, reckoning from 1642, than in the sixty years when it was punished with death. The wisdom of our ancestors during these

hundred and thirty-three years is more to be commended in this, than in some other particulars of their penal law.

Before we quit this branch of the subject, let us compare the punishment of highway robbery with that provided for crimes equally detrimental and malignant. The celebrated moralist, Dr. Johnson, remarks that, "Pride is unwilling to believe the necessity of assigning any other reason than her own will," and that "it may be suspected that this political arrogance has sometimes found its way into legislative assemblies, and mingled with deliberations upon property and life." He goes on to observe that "a slight perusal of the laws by which the measures of vindictive and coercive justice are established, will discover so many disproportions between crimes and punishments, such capricious distinctions of guilt, and such confusion of remissness and severity, as can scarcely be believed to have been produced by public wisdom, sincerely and calmly studious of public happiness." If the provisions we are about to enumerate do not justify this severity of comment, it will at least, to reduce them to any standard of necessity, expediency, or justice, require the introduction of principles with which your committee are unacquainted. For convenience, we refer to the report of the commissioners appointed to revise the statutes, part fourth, that being more easy of access to the members of the House who may wish to follow out the enquiry than the revised statutes in their present condition, and it not being requisite to our argument to notice a few alterations since made in that report, but which are not yet in operation as law.

Highway robbery, chapter 125, section 9, is an assault by one armed, who takes away property, and if resisted intends to kill *or maim;* or if the armed robber

wounds or strikes the person robbed without intending to kill or maim him. For this offence against property, thus endangering life, the punishment of death is denounced. Now it is somewhat remarkable that offences, *not against property*, but which endanger life more directly and imminently, as well as offences more heinous and cruel against the person, the liberty, the honor, and not the purse of the injured party, are guarded against by punishments slight in comparison. Who steals the purse steals trash, but if he steals it openly and so armed as to prevent or repel resistance, he must die for it; while whoso stealeth a man and selleth him, though armed in the same manner, with the same intent to kill if resisted, according to the report, was to be punished by fine not exceeding one thousand dollars, *or* imprisonment in the state prison not more than ten years, *or* in the county jail not more than two years. (Chap. 125, sect. 16.) So that if the robber has taken from a man of wealth, the smallest coin that passes from hand to hand, being driven by the pressure of extreme want, or in the insane fury of intoxication, the judge, with these extenuating circumstances before him, must pass sentence of death. for here nothing is left to his discretion; while if the same robber, armed with the same weapons, with deliberate malice aforethought, too cruel to be satisfied with the murder of its victim, should seize the same man of wealth, bind him hand and foot, and cause him to be transported to the coast of Barbary, and there sold as a slave to the Moors, the judge would be left at his discretion, to inflict a nominal fine upon the offender, or to sentence him to the county jail for twenty-four hours, if he see fit. There is no intention to intimate that the judiciary would in any case affix a trivial punishment to so foul a crime, but

merely to point out the strange inconsistency, with which it is left to their discretion to reduce the punishment of him who takes away that liberty which is dearer than life, to limits merely nominal; while for a crime much less in a moral point of view, and less dangerous to him on whom it is committed, death only can atone, and the court are to have no discretion. This is not the wisdom of our ancestors, for their law on these two points was copied from the Jewish code, and on these two crimes that law was the opposite of ours. Highway robbery was not a capital offence in the law given to Moses: our fathers punished it on the first conviction by branding, on on the second by branding and severe whipping, both too "cruel and unusual" to be inflicted now, under the twenty-sixth article of the bill of rights. The sentence of death did not follow until after the third conviction. (Charters and colony laws, page 56.) But man stealing in the Mosaic code is capital; as may be seen by turning to the twenty-first chapter of Exodus and sixteenth verse, or to Deuteronomy, xxiv. 7. The same is our colony law of Nov. 1646. (Charters &c. page 59.) While we have mitigated the harshness of the law in this case, without diminishing its efficacy, was it wise to aggravate it, as we have done in the other, without a corresponding advantage?

By the provisions of chapter 126, section 11, a person entering in the night without breaking, or by day breaking and entering a dwelling-house, out-house adjoining it, office, shop, ware-house, or vessel, to commit *murder*, *rape*, robbery or other felony, and putting in fear one lawfully therein, is sentenced to the state prison not more than ten years. If a man lifts the latch, and enters furtively, intending to awake no one, but armed to defend

himself if attacked, and steals food to satisfy his hunger, by night, in a dwelling-house, he has forfeited his life. But if he finds the door ajar, and enters with an intent to murder all the inmates, or to commit an injury greater than murder, being armed and by night, and actually putting the inmates in bodily fear, his punishment cannot exceed ten years imprisonment, and may be reduced to the smallest possible time in the discretion of the court. Is not this latter offence more to be feared and guarded against than the former? Is not the man who secretes himself in a house in the day time, in order that he may murder by night, or who in a summer night climbs into an open window for the sole purpose of murdering the inmates of a dwelling-house, more to be feared, and therefore more to be guarded against, than he who stops on the highway an old man, a woman, or a boy, and takes away the slightest article of property, having in his hand a weapon which he forbears to use, although he has been told that the law will take away his life, if he spares the witness whom he has in his power? Is not he who thus enters a house with a deadly weapon to kill his enemy, and then escape under cover of darkness, more to be feared and guarded against, than he who not daring to enter, sets fire to the house on the outside, and then flies? Why then is death the only and the least punishment prescribed for the lesser offences, while that which may be not only morally a greater crime, but actually more dangerous to individuals and to society, is punished at the highest by confinement for a term of years, to be limited in the discretion of the court to any period, however small?

By the twelfth section of the same chapter, the man who enters in the same manner, and with the same intent

to murder or otherwise, as in the eleventh section, but who does not put in fear any lawful inmate, is to be confined in the state prison not more than three years, or in the county jail not more than two years, or by fine not exceeding five hundred dollars. And yet it is by bare accident that the intended murder or other felony has not been committed; and where the design was to commit murder or an equal crime, the attempt is more dangerous than an act of arson, burglary, or robbery, where life has not been sacrificed, and where, as in the great majority of cases, the incendiary, burglar, or robber did not contemplate that it should be sacrificed. The distinctions between the actual commission of the two highest crimes mentioned in the eleventh and twelfth sections, and the attempts with and without alarm, as described in those sections, are dictated by profound sagacity; for they leave the invader of the peaceful dwelling after he has entered, a strong inducement to retire before alarm is taken; and even after the alarm still urge him to stop short of the last degree of guilt, with a power, which if he doubts or hesitates, may sometimes stay his hand. How much wiser then would it be to apply the same policy to the crimes of arson, burglary, and robbery, instead of offering the criminal, by law, a premium for consummating his crime in murder, the highest possible premium, security, for his own life, and letting him know distinctly that if he resists the lion-like temptation, which the law has placed in his path, he resists not only upon peril of death, but of a public infamy more bitter than death.

By the tenth section of the same chapter, any person who by night breaks and enters an office, shop, or warehouse, not connected with a dwelling house, or a ship, with intent to commit murder or any other felony, is to be

imprisoned in the state prison not more than fifteen years. Does a man sleeping alone in an office or shop, stand so much less in need of the protection of the law than one sleeping in a dwelling house, with others around him, to assist in defence, or to give the alarm, as to justify the wide distinction between this crime and burglary? Is an attempt to steal in a dwelling, or on the road, so much higher a crime than an attempt to kill in a shop or office, that while a term of years in prison, shortened at discretion, is ample punishment for the latter, it is absolutely necessary to pass sentence of death upon the former? If the penalties provided in the tenth, eleventh, and twelfth sections of this chapter, and in the sixteenth section of the preceding chapter, are sufficient to answer the purpose of prevention, and your committee see no reason to doubt that they are so, how are we to justify the capital punishment of any crime against property? Your committee do not know of any instance in which the crimes specified in those sections were committed clearly because a severer punishment was not provided for them, but there are very numerous instances on record where the crimes of arson, burglary and robbery have been followed by murder undoubtedly because they were punishable with death.

The further we pursue this comparison the stronger evidence shall we accumulate, that capital punishment is not necessary for the prevention of any crime against property. By the sixth section of chapter one hundred and twenty-fifth, if any person with malicious intent to maim or disfigure another, should cut off his legs, arms, nose and ears, cut out his tongue, and put out his eyes, what punishment is assigned to him? A fine not exceeding two thousand dollars, *or* not more than ten years

in the state prison, *or* not more than three years in the county jail. Is that amount of money which a man carries about him of more value to him than all his limbs and organs? Or does it stand more in need of the protection of the law? Or is life more endangered by taking money with intent to kill if resisted, than by tearing out the tongue and eyes with the same intent to kill if resisted? Let this question be answered by considering the comparative probability of a desperate resistance in the two cases. Or, again, is he a more dangerous member of society who takes away the pocket book, than he who tears out the tongue and eyes? Yet the statute against maiming has stood unaltered since the revision of 1805, and has been effectual for its purpose, the more so, no doubt, because it was not so severe as to leave the offender to hope that it would not be enforced. The fine mentioned in this section was introduced by the commissioners.

In the seventh section of the same chapter, the punishment for an assault with intent to murder is fixed to be a fine not more than two thousand dollars, not more than ten years in state prison *or* not more than two years in the county jail. This must be at least as severe as public sentiment requires, for as the law has stood for more than thirty years, the term in state prison *could not exceed four years*, and the fine has been added by the commissioners. By the tenth section, if one armed with a dangerous weapon, assaults another with intent to murder, he shall be imprisoned in the state prison not more than twenty years. By these assaults, the life, being the object aimed at, is put in greater peril than in arson, burglary, or robbery, where the object aimed at is only property, yet a punishment far short of perpetual impris-

onment is sufficient for the protection of life against such attempts, and no one complains that it is less than it should be. The bad passions and the recklessness which occasion assaults with intent to murder, are of course the same with those which produce actual murders, so that, if the punishment of death is the only terror effectual to suppress those passions, or if the murderer is to be executed, because having proved that he has a disposition to kill, society cannot be safe while he is alive, then these assaults should be punished with death for the same reason as murder, and with much more reason than the three crimes against property which we have been considering. But it will be said, and justly said, these assaults should be punished less severely than murder, that the criminal may not be made desperate, but may have an opportunity and a motive to pause while it is uncompleted. If this argument is good for anything, it applies with much greater force to the three capital crimes against property. There is more chance that a burglar or a robber, will stop short of murder, if the punishments are different, and if the law does not urge him to kill by the hope of securing his own life, than, that the intended murderer will stop short of his intent, after he has made the assault, from which the fear of death did not deter him.

By section eighth of the same chapter, a person attempting to murder by poisoning, drowning, or strangling another, shall be imprisoned five years in the state prison, or fined not more than two thousand dollars, and sent to the county jail for not more than two years; and by section eighteenth, he, who shall mingle poison with food or medicine, or wilfully poison a spring, well, or reservoir of water, with intent to kill, shall be imprisoned in the state

prison not more than two years, or fined not more than five hundred dollars. Which, then, most deserves the care of the law, property or life? For it cannot be that life itself is more endangered where it is not aimed at, than in the poisoning of the spring which supplies a whole neighborhood, or of the medicine which the sick man swallows without suspicion. But the law has guarded the purse with more jealousy than life, or even than that which is dearer than life, for by the fifteenth section an assault upon a woman with intent to violate her honor, which may be committed with intent to kill if resisted, or even if not resisted, is punished by imprisonment at the discretion of the court, or by fine.

But a still more striking contrast is furnished by the law of manslaughter, the wisdom of which is not impeached. If one kills another, voluntarily and without justification, but upon sudden passion without previous malice, by the fifth section of the chapter last referred to, he is to be punished, not with death, but with a fine, or imprisonment in the state prison, not more than ten years, or in the county jail, not more than three years. If the same extenuating circumstances exist in cases of arson, burglary, or robbery, they do not change the denomination of the crime, or diminish the punishment. Suppose a desperate man just ruined at a gaming table, meets one who enrages him by bitter reproaches, and then, provoked by an angry answer, strikes him. If in his fury he should seize this man, snatch from him his pocket book, and fly, having about him a dagger which he does not use, but only threatens to draw; this is highway robbery, punishable with death. If he had drawn his dagger and stabbed him to the heart, this would have been only manslaughter, and the punishment made as light as the court see fit to

make it. The law, therefore, counsels an angry man to wreak his revenge upon life and not upon property, which in such cases it holds more sacred.

How are these inconsistencies to be accounted for? The observations of Dr. Johnson may throw some light upon them, and deserve to be quoted also for their applicability to the subject generally. "It has been always the practice," says the great moralist, "when any particular species of robbery becomes prevalent and common, to endeavor its suppression by capital denunciation. By this practice capital inflictions are multiplied, and crimes very different in their degrees of enormity, are equally subjected to the severest punishment that man has the power of exercising upon man. This method has long been tried, but tried with so little success, that rapine and violence are hourly increasing; yet few seem to despair of its efficacy, and of those who employ their speculations upon the present corruption of the people, some propose the introduction of more horrid, lingering, and terrific punishments; some are inclined to accelerate the executions, some to discourage pardons; and all seem to think that lenity has given confidence to wickedness, and that we can only be rescued from the talons of robbery by inflexible rigor and sanguinary justice. (This was in 1751.)

Yet since the right of setting an uncertain and arbitrary value upon life has been disputed, and since the experience of past times gives us little reason to hope that any reformation will be effected by a periodical havoc of our fellow beings, perhaps it will not be useless to consider what consequences might arise from relaxations of the law, and a more rational and equitable adaptation of penalties to offences. To equal robbery with murder, is to reduce murder to robbery, to confound in common minds

the gradations of iniquity, and incite the commission of a greater crime to prevent the detection of a less. If only murder were punished with death, very few robbers would stain their hands in blood; but when by the last act of cruelty no new danger is incurred, and greater security may be obtained, upon what principle shall we bid them forbear?

From the conviction of the inequality of the punishment to the offence, proceeds the frequent solicitation of pardons. They who would rejoice at the correction of a thief, are yet shocked at the thought of destroying him. His crime shrinks to nothing compared with his misery; and severity defeats itself by exciting pity.

The gibbet, indeed, certainly disables those who die upon it from infesting the community; but their death seems not to contribute more to the reformation of their associates than any other method of separation. A thief seldom passes much of his time in recollection or anticipation, but from robbery hastens to riot, and from riot to robbery; nor when the grave closes upon his companion, has any other care but to find another.

The frequency of capital punishments, therefore, rarely hinders the commission of a crime, but naturally and commonly prevents its detection, and is, if we proceed only upon prudential principles, chiefly for that reason to be avoided. Whatever may be urged by casuists and politicians, the greater part of mankind, as they can never think that to pick the pocket and to pierce the heart are equally criminal, will scarcely believe that two malefactors so different in guilt, can be justly doomed to the same punishment; nor is the necessity of submitting the conscience to human laws so plainly evinced, so clearly stated, or so generally allowed, but that the pious, the tender

and the just will always scruple to concur with the community in an act which their private judgment cannot approve.

He who knows not how often rigorous laws produce total impunity, and how many crimes are concealed and forgotten for fear of hurrying the offender to that state in which there is no repentance, has conversed very little with mankind. And whatever epithets of reproach or contempt this compassion may incur from those who confound cruelty with firmness, I know not whether any wise man would wish it less powerful or less extensive.

All laws against wickedness are ineffectual, unless some will inform, and some will prosecute; but till we mitigate the penalties for mere violations of property, information will always be hated and prosecution dreaded. The heart of a good man cannot but recoil at the thought of punishing a slight injury with death; especially when he remembers that the thief might have procured safety by another crime, from which he was restrained only by his remaining virtue.

The obligations to assist the exercise of public justice are indeed strong; but they will certainly be overpowered by tenderness for life. What is punished with severity, contrary to our ideas of adequate retribution, will be seldom discovered; and multitudes will be suffered to advance from crime to crime, till they deserve death, because if they had been sooner prosecuted, they would have suffered death before they deserved it."

The celebrated Sir Thomas More, chancellor of England, more than three hundred years ago, expressed a decided opinion against the punishment of death for crimes against property. "It seems to me a very unjust thing," says he, "to take away a man's life for a little money; for

nothing in the world can be of equal value with a man's life. And if it is said that it is not for the money that one suffers, but for his breaking the law, I must say, extreme justice is an extreme injury; for we ought not to approve of these terrible laws that make the smallest offence capital, nor of that opinion of the stoics, that makes all crimes equal; as if there were no difference to be made between the killing a man and the taking his purse, between which, if we examine things impartially, there is no likeness nor proportion. God has commanded us not to kill; and shall we kill so easily for a little money? God having taken from us the right of disposing of our own or of other people's lives, if it is pretended that the mutual consent of men in making laws frees people from the obligation of the divine law, and so makes murder a lawful action; what is this but to give a preference to human laws before the divine? If a robber sees that his danger is the same, if he is convicted of theft as if he were guilty of murder, this will naturally incite him to kill the person whom otherwise he would only have robbed; since, if the punishment is the same, there is more security, and less danger of discovery, when he that can best make it is put out of the way; so that terrifying thieves too much provokes them to cruelty." He also represents John Morton, Archbishop of Canterbury, his predecessor in the office of Chancellor, and the principal adviser of Henry VII, "a man not less venerable for his wisdom and virtues than for his high character, eminently skilled in the law, and of a vast understanding, whose excellent talents were improved by study and experience," as remarking, that an experiment might be made of subtituting hard labor for death; "and if it did not succeed, the worst would be, to execute the sentence on the condemned persons at last." This exper-

iment he did not believe "would be either unjust, inconvenient, or at all dangerous," an opinion in which His Excellency the Governor, in his observations already quoted, concurs.

This branch of our subject is practically important. From November, 1813, to January, 1831, there were eighteen persons ordered for execution, under our state laws. Of these, two committed suicide in prison, and sixteen were hanged. Eight were executed for crimes other than murder, being just half the number of sufferers.

Of the crime against female honor, we shall say but few words. It is now generally unpunished, from the difficulty of obtaining a capital conviction. When we consider the tremendous power which this law would put into the hands of a bad and revengeful woman, if jurors were not unwilling to convict, we cannot wonder at their reluctance. There is generally but one witness, and the acquittal of the accused after her testimony has been heard, where it is clear and conclusive, seems to add a new burthen of dishonor, to a wrong already too great to be endured; while a conviction and execution only agonizes the injured party with the idea, that through her instrumentality, a wretch has been prematurely launched into eternity, and that the outrage she has suffered, and the evidence she has given, which she would wish to be buried in oblivion, are the subjects of general conversation, perhaps of misconstruction, certainly of levity and ribaldry among the abandoned and vicious through a wide region. The mere chance of loss of life, which a soldier will brave for sixpence a day, and which cannot prevent a crime carried on as deliberately as larceny, and for as small temptation, cannot have much effect in restraining those insensible to higher motives. An execution which took place at Worcester, for this crime, on the eighth of December, 1825, was soon

afterwards followed by an attempt, by a brother of the criminal, to commit the same crime for which his relative had just suffered the loss of his life. The experience of England, Ireland, and France, does not show that the fear of death is a preventive of this crime, but does show, that capital punishment for the offence often causes the murder of the victim of the outrage. Several cases of this effect have been known in the United States; and one not long ago excited much attention in a neighboring state. To substitute a punishment which would not lead to murder, and which being more likely to be inflicted, would be more effectual, would be a most salutary reform.

The crime of treason, under monarchical governments, and by the advocates of arbitrary power, has been magnified into guilt of the most malignant dye. But a little reflection upon the nature of the various revolutions recorded in history will show us that treason and patriotism have often been convertible terms, and that it depends upon the failure or the success of his undertaking whether the adventurer shall be crowned with laurel or branded with infamy, so far as government is the dispenser of good and evil fame. More and Fisher, Sidney and Russel died the death of traitors; while Henry Tudor ascended the throne, and Cromwell attained a power greater than that of many kings. Ney and Labedoyere perished for adhering to the army and the nation against a family hated by both, while men who had voted for the death of Louis XVI. were honored with offices of the highest trust under his legitimate successor. Riego was sent to a scaffold because a revolution had turned and gone backward, as Washington, Hancock and Adams might have been if ours had not triumphed. Treason then is the crime of being defeated in a struggle with the

government, whether wrongfully undertaken, or in a just and holy cause. "The Hungarians were called rebels first," says lord Bolingbroke, "for no other reason than this, that they would not be slaves." Tekeli and the malcontents demanded the preservation of their ancient privileges, liberty of conscience and the convocation of a free parliament. What precise proportion of all the treasons ever committed have been of the same character might be difficult to determine, but it is certainly very large.

For this offence, the most cruel tortures have been inflicted upon the miserable victims of tyranny. Sycophantic and corrupt legislators and judges have so far enlarged and extended its definition, that at some periods of English history, a man could hardly tell what actions of his life might not be interpreted to amount to constructive treason. Under Henry VIII., clipping an English shilling, or believing that the king was lawfully married to *one* of his wives, was no less than high treason. The heart of the offender was torn out from his living body, dashed in his face, and then burnt; but the punishment was too shocking to be described in all its horrid details. It was inflicted upon prince David, a Welsh patriot, in the reign of Edward First, in 1283, and continued to be the law of the land for about five hundred years afterwards, until Sir Samuel Romilly, to whom the British nation is indebted for other meliorations in their criminal code, and for his disinterested and unwearied efforts to effect reforms which he did not live to witness, by his eloquence and weight of character was able to abolish the most revolting of the barbarities it included. It was frequently inflicted, during that long period, for "having been during a civil war faithful to an unfortu-

nate king; or for having spoken freely on the doubtful right of the conqueror." Such a law was suffered to remain in force five centuries, as if to warn mankind how easily the most execrable example may be introduced, and with what difficulty a country is purified from its debasing influence.

In this Commonwealth we have no reason to complain that treason is by judicial construction, extended beyond its proper limits. With us it consists in levying war against the Commonwealth, or in adhering to the enemies thereof, giving them aid and comfort. Our revised statutes adopted this definition from the constitution of the United States. No state of this Union needs a treason law, for in every case likely to arise, the federal law will be applicable and sufficient. In a collision between a state and the federal government, in case of rebellion, organized under the state authorities, a state treason law would come into action. Under its provisions, the man who adhered to his oath of allegiance to the United States, might be hanged for his fidelity, while in retaliation, he who obeyed the state authorities might be hanged by the general government for treason against them. If it is wise to anticipate and provide for such a state of things, then a state treason law may be expedient, otherwise it would seem to be unnecessary.

If a law against treason be needed, still there is no need that the punishment should be capital. The class of men who take the lead in such enterprises are not to be deterred by the fear of death; but the prospect of it only makes them more desperate, after they have once embarked. The government cannot go through the judicial forms, and execute the sentence against a traitor, while he continues to be dangerous: after the danger is over, they may, but it would then be a gratuitous cruelty.

In preparing the revised statutes, we have gone back to revive the statute of 1777, enacted during the war of the revolution, and which was never before re-enacted since the adoption of the constitution of 1780. The first treason law in the colony, our ancestors enacted in 1678, the year of the popish plot, to show their abundant loyalty, "that whatsoever person within this jurisdiction shall *compass, imagine or intend* the death or destruction of our sovereign lord the king, whom Almighty God preserve, with a long and prosperous reign, or to deprive or depose him from the style, honor or kingly name of the imperial crown of England, *or of any other of his majesty's dominions,* * * * * shall suffer the pains of death." This sovereign lord was the dissolute and depraved Charles II., already stained with the blood of some of New England's best friends. This law grew out of the same excitement which produced, and was further inflamed by the perjuries, forever infamous, of Doctor Titus Oates. One hundred years afterwards it was law, that if any one who had sworn allegiance to George III. attempted to resist those who were depriving their sovereign lord of a very considerable part of his majesty's dominions, should suffer the pains of death: thus not merely repealing the former law, but decreeing death to those who should act under it. In 1696, a statute enlarged the definition of treason, so as to include imagining the death of the queen, or of the heir apparent, or *counterfeiting* the king's great seal, or privy seal, or the seal of the province.

In 1786 there were several convictions of treason, the last that have occurred in this state. The state was burthened with a heavy debt, and so was almost every town and parish in it; the debts due from individuals

were immense; there was a general relaxation of manners, a decay of trade, a scarcity of money, mutual distrust, a universal want of confidence and credit, the natural consequences of an eight years war. The taxes granted for state purposes for 1786, amounted to $1,038,097 54. The taxable property of the Commonwealth was probably less than one fifth of its present value. Including the inhabitants of Maine, the population was less than the present number in this state alone. A state tax of five millions of dollars now would be much less onerous than the tax of 1786. Such were the causes of the discontent which ripened into Shay's rebellion. Although Shay's embodied eleven hundred men, it was quelled with the loss of very few lives; notwithstanding the convictions, no executions followed, and the Commonwealth has enjoyed internal quiet fifty years. If these misguided men had been dealt with after the fashion of the old world, and half the Commonwealth clothed in mourning by the execution of the law, could this happy result have ensued? The bitter feelings of resentment implanted in the breasts of those who had lost fathers, brothers, sons, friends and relatives, dear to their hearts, and victims of a popular delusion, would have long survived the occasion which gave them birth. This spirit of revenge would have burst out in another insurrection, perhaps successful, as soon as circumstances conspired to favor it. Had Massachusetts been involved in a series of civil commotions, it is by no means certain that the federal constitution would have been adopted, and what would have been the fate of this nation without the federal union, we may conjecture from the anarchy, and ceaseless wars, and frequent despotisms, of all the leagued republics of our own or former ages. The paternal conduct of our government allayed the passions

of those implicated in the affair, and reconciled all to a patient endurance, until better times, of evils which could not be at once removed. Many doubted, then, whether mercy or severity would be the better policy. The result has settled that question. Your committee suggest, respectfully, whether it be wise and prudent, to place in the hands of government an instrument, which in a period of excitement may be employed to inflict a lasting injury, and which can never, under any circumstances, be necessary or useful. Either the state treason law should be struck from the statutes entirely, or the crime should cease to be capital.

The case of wilful murder remains to be considered. It is not necessary to hang the murderer in order to guard society against him, and to prevent him from repeating the crime. If it were, we should hang the maniac, who is the most dangerous murderer. Society may defend itself by other means than by destroying life. Massachusetts can build prisons strong enough to secure the community forever against convicted felons.

Some will justify capital punishment on the ground, that it may prevent the perpetration of the crime by others; a most shocking sort of experimenting upon human nature; to kill one man in order to reform or confirm the virtue of another. This idea seems to involve an absurd, but an awful perversion of all moral reasoning. Of all the means of exerting a good moral influence upon society, that of shedding human blood, would seem to be the wildest and the worst that has ever been resorted to by reformers and philanthropists!

But if anything can be judged by history, observation, and experience, it has long been demonstrated, that crimes are not diminished, but on the contrary, increased by capi-

tal punishments. Whenever, and wherever punishments have been severe, cruel, and vindictive, then, and there, crime has most abounded. They are mutually cause and effect. If severe punishments do not tend directly to produce the very crimes for which they are inflicted, as in some cases it may be shown statistically, that they have done, they indirectly, by ministering to bad passions, and diminishing the natural sensibility of man for the sufferings of his fellow man, induce that hardness of heart which prepares the way for the commission of the most ferocious acts of violence. Under no form of government have severe corporal punishments, frequently and publicly administered, improved the public morals. The spectacle of capital punishments is most barbarizing, and promotive of cruelty and a disregard of life. Whoever sees life taken away by violent means experiences a diminution of that instinctive horror which for wise purposes we are made to feel at the thought of death. Let the idea of crime, horrible crime, be indissolubly and universally associated with the voluntary and deliberate destruction of life under whatever pretext. Whoever strengthens this association in the public mind does more to prevent murders than any punishment, with whatever aggravation of torture, can effect through fear. The denomination of friends have always been educated in this idea, and among them murders are unknown. The strongest safeguard of life, is its sanctity; and this sentiment every execution diminishes.

That the fear of death has not that effect on criminals which a mere theorist might suppose, is well known to every practical observer. Robberies are planned under the gallows, by the accomplices of the sufferer in his last crime. Mr. Dymond relates the story of a man executed for uttering forged bank notes, whose body was delivered

to his friends. With the corpse lying on a bed before them, they were seized in the act of carrying on the same traffic, and the officer coming upon them suddenly, the widow thrust a bundle of the bills into the mouth of her dead husband for concealment. A committee of the legislature of Maine, in their excellent report made last year upon this subject, remark, that "those whom it would be desirable to affect solemnly, and from whom we have the most reason to fear crime, make the day of public execution a day of drunkenness and profanity. These, with their attendant vices, quarrelling and fighting, were carried to such an extent in Augusta, (at Sager's execution) that it became necessary for the police to interfere, and the jail, which had just been emptied of a murderer, threw open its doors to receive those who came to profit by the solemn scene of a public execution." The circumstances preceding the execution of Prescott, at Hopkinton, New Hampshire, a few months ago, illustrate the moral effect of the law. The riot of a mob thirsting for his blood, and desirous to take revenge with their own hands, rather than lose the spectacle of that wretch's last agonies, resulted in the death of a tender wife, daughter, and mother, for whose known danger the revengers of blood, in their fury, felt no pity. Such examples must have a fearfully hardening effect: the spectators go away with their virtuous sensibility lessened, their hearts more callous, and with less power of resistance, if any strong temptation shall urge them to a deed of blood.

That hanging adds no new terrors, to that death which all must sooner or later meet, is evident from its having become so common a mode of suicide, for which purpose it was almost unknown among the ancients. Not only the mode is borrowed, but the act itself is often suggested,

from public executions. Often, very often has it happened, that an execution has been followed *on the next day*, or within a few weeks by suicides among those who witnessed the scene. It cannot be expected, therefore, that it should have any peculiar virtue to deter from crime; least of all from that crime for which it steels the breast, and braces up the nerves. Very lately, in the state of Ohio, and the day on which a man was executed for the murder of his wife, under circumstances of particular cruelty, another man, near the place of execution, murdered his wife in the same manner; and this is by no means the only instance where the crime seems to have been directly suggested by the punishment intended to prevent it. Howard tells us that in Denmark, where executions are seldom known, women guilty of child murther were sent to the spin-houses for life, a sentence dreaded so much more than death, that since the change the crime has been much less frequent. He also noticed the fact, that in Amsterdam, there had not been a hundred executions for a hundred years, while in London from 1749 to 1771, there were six hundred and seventy-eight, or nearly thirty a year; yet the morals of London are certainly not improved in proportion; and the English are becoming convinced, by experience, that it is not by the prodigal waste of the blood of offenders that offences are to be checked, and least of all, those high crimes springing from ungovernable passions, or a depravity or stupidity beyond the reach of motives not competent to restrain lesser criminals from lesser guilt. In France capital punishments do not diminish the number of murders, which in 1831 amounted to 267, while the average of five preceding years was only 227. In Pennsylvania and Ohio, where murder is the only crime punished with death, the other five crimes cap-

ital among us are "as rare as any where in Christendom." In Maine, four of these offences have ceased to be capital, with such favorable results that no one proposes to go backward, but there is a strong disposition to abolish all capital punishments. In New Hampshire, where they punish only murder and treason with death, the proportion of convicts to the state prison to the population, is only one in 16,208, while in Massachusetts, with six capital crimes, it is one to 7,016. In Tuscany, while there were no capital punishments, there were but four murders in twenty-five years, while in Rome there were twelve times that number in a single year, death being the penalty. Under the stern severity of the British law, crimes have increased in fourteen years, as twenty-four to ten, that is more than doubled! Of 167 convicts under sentence of death, Mr. Roberts found that 164 had attended executions. A punishment cannot be necessary to repress the crime of murder, which has not so strong a tendency to repress it as milder punishments. A punishment cannot be necessary which fosters the propensities which occasion murder.

This punishment is not only unnecessary for protection, which would seem to be its only legitimate object, but so crude and ill considered have been the opinions heretofore entertained upon the subject, that this committee feel compelled to go one step further, and urge, that it is not justifiable for revenge. This may appear to some superfluous, but there is strong ground to believe, that the vindictive feelings are at the bottom of much of the zeal manifested in favor of "cruel and unusual punishments," among those who do not weigh their opinions so carefully as the members of this house. There can be no need to prove, it suffices to suggest, that revenge is an un-

holy passion, itself the parent of many crimes, often of the crime of murder, and that it cannot be that the law should gratify and foster in the breasts of men the spirit of demons. The law should be wholly passionless, unbiassed by resentment or partiality, sitting in calm severity in the temple of justice, to mete out penalties by the measure of absolute necessity, and staying the hand of the wrong-doer: thus, and thus only, should it guard the public good and protect individual rights. There may have been many cases where government found it expedient to employ revenge, as well as other bad passions, to execute its decrees: such a necessity is to be regretted, and the practice abandoned as soon as the necessity ceases. Encouraging common informers was an expedient of this sort, very common in our own laws, but it has been wisely stricken out in almost every instance from the revised statutes. Fixing a price upon the head of a refugee was once thought just and useful, but is now condemned. Promising pardon to an accomplice, to induce him to testify against his fellow criminal, is a use now made of the treachery which is despised while it is used.

In a state of nature, every man revenges to the utmost of his power the injury that he has received: retaliation is the only rule of punishment. In a rude state of society these practices are suffered to continue, because they cannot be prevented. The law only undertakes to restrict them within certain limits, and to forbid their most cruel excesses. The legislator who should enact laws which presuppose a more elevated standard of morality, would find that public opinion did not sustain him, and that his statutes would remain inoperative and useless.

It has been observed, that among a people hardly yet emerged from barbarity, punishments should be most severe, as strong impressions are required; but in proportion as the minds of men become softened by their intercourse in society, the severity should be diminished, if it be intended that the necessary relation between the infliction and its object should be maintained. For this reason, the indulgence of individual revenge is much less an evil, while society is obliged to tolerate it, than it would be in a later stage, when it might be, and ought to be suppressed. We must carry these ideas with us, while we enquire whether regulations promulgated in the infancy of our race, or adapted afterwards to a peculiarly stiff-necked and obdurate people, are obligatory upon mankind in their present refinement and civilization.

Sundry passages in the Jewish scriptures have been adduced, as authorizing and enjoining capital punishments. These injunctions were addressed to people, but a few removes from the condition of savages, and almost universally addicted to the most heinous acts of wickedness. For the hardness of their hearts, their great law giver wrote them the sanguinary precepts, which a blind attachment to antiquity still invokes, in part, though all of them unsuited to our circumstances, and most of them universally confessed to be so. In those days when the constant exhibition of the most stupendous miracles could not soften their adamantine hearts, which seem to have been almost as hard as Pharaoh's, nor subdue that stubborn unbelief of the rebellious Hebrews, which is perhaps the most wonderful feature in their whole amazing history, (see Numbers, chapter xi, also ch. xii, 10 and 11, 22, and 39 to 45, also ch. xvi, and many other instances from their departure out of Egypt down to the

present time) when, after the carcasses of that whole "evil congregation," even six hundred thousand footmen, had fallen in the wilderness for their obdurate impenitence, their sons grew up "an increase of sinful men," and took no warning by the plagues in which their fathers perished, it is obvious why the most terrible national judgments must be denounced upon them, for their national sins, such as are unheard of in modern history. (Deut. iv, 24—28, xxvii, and three following chapters —utter perdition; to be scattered and banished; their land to become brimstone and salt, and be cursed like Sodom and Gommorrah; to be smitten with war, famine, and pestilence, and driven to eat their own children.) It is equally obvious that the severest punishments for private offences, (stoning to death and burning to death) though they might be necessary to produce an effect upon a character constituted like theirs, are not therefore suited to our times, when far from exercising a salutary influence, they would universally be deemed, degrading and demoralizing spectacles. In those days when there was no king in Israel, nor any other government capable of preserving its authority, and maintaining social order, when every man did that which was right in his own eyes, (Judges xvii, 6, also xxi, 25,) it would have been impracticable, without a perpetual miracle, even if it had been desireable, to exclude from cases of crime and punishment the operation of revenge. The fact, that it was permitted, and legalized therefore, does not furnish us, who can exclude that passion, with a profitable example for imitation. During their forty years wanderings in the wilderness, through the long period of anarchy and slavery, alternately prevailing, which preceded their kings, and during the bloody series of treasons, suc-

cessful rebellions, civil wars, and foreign invasions, which followed the first assumption of the royal dignity, and ceased not till the final destruction of the nation under those awful circumstances so often foretold, imprisonment for life, or even for a term of years, would have been incovenient and insecure: nor would the prison, as among civilized people, have inspired the beholders with a wholesome terror; amid such appalling scenes as fill their annals, to many a wretch it might well appear a refuge from despair and the abode of peace. There was then no fit substitute for capital punishments, and they were resorted to almost of necessity. But, because a peculiar people, under the most peculiar circumstances, by as express an interposition of heaven, as that which directed Abraham to offer up Isaac, were commanded to punish certain crimes with death, shall we, a polished and humane people, whose moral sensibility is deeply wounded by the spectacle, under circumstances essentially opposite to theirs, without warrant, violate the great command, which says to the legislator as well as to the subject, thou shalt not kill? This is the command both of nature and of revelation; it grows out of no local or temporary occasion, but is eternal and universal in the obligation it imposes. How, then, dare any man disobey it; and how is it an excuse for our disobedience, that the man we kill has broken this law before we break it, and that we have taken into our own hands to exercise upon him, that vengeance which the Almighty has declared belongs to himself, because he, in his inscrutable purposes, some thousands of years ago, specially authorized a particular people, in specified cases, to be the executors of his vengeance? We have no message from heaven, as they had, exempting from this law the six cases which

our statutes exempt. This commandment made a part of the Mosaic code, with various exceptions. In the new testament it is re-enacted as a positive and unyielding text, and as such makes a part of the christian system. The sanction of that part of the commandments relating to moral conduct is recorded by three of the evangelists. (Matthew, xix. 18, 19; Mark x. 19; Luke, xviii. 20.) They all enumerate the third, sixth, seventh, eighth and ninth commandments, to which one adds the words "Defraud not"—and another, "Thou shalt love thy neighbor as thyself," and they all relate that lesson of self-devotion and comprehensive charity which illustrates so happily the spirit in which these precepts are to be observed, upon hearing which the rich man, or *ruler*, as Luke calls him, went away sorrowful, for he had great possessions. No qualification is any where attached to either of these rules. We are not forbidden to steal except in certain cases, to bear false witness except in certain cases, to defraud except in certain cases, or to love our neighbor as ourselves except in certain cases. It is to be proved, then, before it can be admitted, that the command, "Thou shalt not kill," is any less universal than these. Surely the direction, immediately after the recapitulation, given to the young man to dedicate all his vast possessions to the relief of the helpless and the destitute, affords no countenance to the assumption that christians are allowed to kill any one, for any breach, however aggravated, either of conventional or natural law. Your committee can conceive of but one excuse which could ever justify that assumption, the imperative necessity which they have endeavored to show does not exist with either of our six capital crimes in the present state of society.

It is sometimes supposed, that, although remarks like

these may be justly applied to all other capital punishments, yet that there is one solitary exception; that the life of the murderer we may rightfully take away, because such authority was given to Noah, by a law intended to be universal and perpetual. Is not this impression founded upon an entire misapprehension of the passage which has given rise to it? If there is reason to doubt whether this passage justifies the construction so often put upon it, the true import ought to be ascertained by a careful examination.

The ninth chapter of Genesis contains the covenant with Noah. In the first verse, God blesses the patriarch and his sons. The second verse continues, "And the fear of you, and the dread of you, shall be upon every beast of the earth," &c. The third verse authorizes the eating of animals, as well as vegetables. The fourth verse annexes a restriction upon this liberty, and with the two succeeding verses is as follows:—"4. But flesh with the life thereof, which is the blood thereof, shall ye not eat. 5. And surely your blood of your lives will I require; *at the hand of every beast will I require it*, and at the hand of man; at the hand of every man's brother will I require the life of man. 6. Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." It is here to be remarked that the Hebrew participle translated "whoso sheddeth," answers to our English word "shedding," and might, with quite as much or more propriety, be rendered "whatsoever sheddeth;" and the grammatical construction will be consulted by substituting "its" for "his." The clause will then read, "whatsoever sheddeth man's blood, by man shall its blood be shed." This makes it consistent with the context. The object seems to be to inculcate the sanctity of

human life. The fear and dread of man shall be upon every beast; the beasts may be eaten for food, but not with the sacred principle of life, the blood. For life is sacred, and if your blood of your lives shall in any case be shed, I will require a strict account of it, whether it be shed by beast or man. I will myself call to a strict account the *man* who shall shed the blood of his brother, but if a *beast* has shed man's blood, by man let that beast be slain, because that beast has profanely marred the image of God in the human frame. The provision conforms naturally with that dread and fear, with which beasts are to regard their appointed lord; it accords precisely with the main object of the law itself, that blood shall not be eaten, in order to cultivate a reverence for the principle of life; and we see the force of the reason for it, that man is made in the image of the Deity, which would not be very apparent, if it were understood to mean, that because murder was a marring of God's image, therefore, whenever that image had been once marred, it should be marred again. That the Divine Wisdom did prescribe both these regulations, to eat no blood, and to slay the beast which destroyed a man, is an unquestioned fact, and the latter would seem likely to be as effectual as the former in heightening the estimation of human life, which a second marring of the divine image in revenge for the first would only tend to cheapen. Both these regulations were re-enacted at a later date; the first in Leviticus xvii. 10 to 14, where we read, "I will even set my face against that soul that eateth blood, and will cut him off from among his people. For the life of the flesh is in the blood." And again, "the life of all flesh is the blood thereof; whosoever eateth it shall be cut off." The other of these regulations is to be found in Exodus

xxi. 28. "If an ox gore a man or woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."

If this be not the true interpretation of the sixth verse of the ninth chapter of Genesis, but it is to be understood to mean the man who sheds, and not the beast who sheds, it is still far from evident that the passage contains a law. "Whoso sheddeth man's blood, *by man shall his blood be shed*," is an expression precisely parallel to that of the New Testament, "All they that take the sword *shall perish with the sword;*" but it was never imagined that this latter passage contained a divine command to Christians to exterminate with the sword every member of the military profession; why then should the former be thought to enjoin capital punishment? The two passages, if the former refers to man and not to beasts, would seem to be merely declaratory of the natural and general consequences, the one of murder, the other of war. If this were a law, it would be peremptory in all cases, death for death, making no distinction between murder, manslaughter, excuseable and justifiable homicide, much as the law now is among some oriental nations. If this law is obligatory upon us, it is obligatory in this form, yet no member of this Legislature would be willing so to receive it. If it were meant for a universal law, why was it not given when the first case happened, that of Cain, and why was it not ordered to be enforced in so many cases occurring throughout the historical parts of the Old Testament, such as those of Moses and David, to instance no more. A law which is not stated to have been enforced in a single case for many hundred years after it was given, under a theocracy, and while it was often broken, cannot have been meant for universal obser-

vation, ages after, under governments far from infallible, and when milder manners, and the extinction of that ferocity of character prevalent in early times, call for milder punishments.

If the antiquity of this supposed law is alledged to give it a perpetual binding authority, go back to a much more ancient decision upon the same point, much more likely to be intended for an everlasting precedent. For the hardness of their hearts, precepts suited to a rude and half barbarous race were given to the Jews, and for the same reason were even more likely to be given to the immediate descendants of Noah; but in the beginning it was not so. Cain was sentenced to be a fugitive and a vagabond, and in his despair he cried out, "my punishment is greater than I can bear." "And the Lord said unto him, Therefore, whosoever slayeth Cain *vengeance shall be taken on him seven fold.* And the Lord set a mark upon Cain, *lest any finding him should kill him.*" A few verses farther on, we find Lamech saying to his wives, "I have slain a man to my wounding, and a young man to my hurt: if Cain shall be avenged seven fold, truly Lamech seventy and seven fold." From which we may infer that the precedent established in the case of the first murderer was followed in that of the second, and that he who first violated the sanctity of life was judged less worthy of protection than he who should afterwards follow that evil example. If capital punishment was not necessary for the preservation of the best interests of society in the time of Cain and Lamech, when imprisonment was impossible, and not even attempted, and that it was not, appears from the judgment of that wisdom from which there is no appeal, how can it be needed now,

when we have the most perfect arrangements both for securing and reforming the offender?

That this law, if it be a law, is more ancient than the law of Moses, is no reason for believing it was not abolished or superceded by Christianity. Circumcision was the sign of the covenant made with Abraham and his posterity ages before Moses, and Moses himself was threatened with the punishment of death for the non-performance of this rite even before the departure out of Egypt. (Exodus iv. 24, 25, 26.) Yet it appears in the fifteenth chapter of Acts, that the apostles after a full discussion of the matter, did not hesitate to declare that no Gentiles need be circumcised, (Acts xv. 1–29, also xxi. 25,) although the command was given to the patriarch and to all his descendants, including whole nations of Gentiles, and to all their slaves, also Gentiles, under penalty of death, and "for an everlasting covenant." (Genesis xvii. 9–14.) This command bears much more the appearance of being literally everlasting in its obligations than the phrase in question, yet Christians now make great exertions to convert Jews from their observance of it, believing it to have become for the last eighteen centuries null and void. A much more ancient institution than this, the sabbath of the seventh day, sanctified at the creation, Gen. ii. 3, and seeming to be of universal obligation from that circumstance, for the slightest infraction of which the penalty of death was inflicted; (Ex. xxxi. 14, xxxv. 2. Numbers xv. 32–36.) was abolished by the Christian religion. But there is no reason to believe that this part of the covenant given to Noah extends any farther than the rest. It is no more than co-extensive with the prohibition to eat blood, which was renewed by the apostles and applied to the Gentiles,

when they released them from that intolerable yoke the Jewish law; and by breaking which a man forfeited his life, while the injunction to punish murder with death is no where to be found in the New Testament. That part of the command which the apostles especially retained and recommended to the Gentiles, we have abandoned as being unsuited to our circumstances; why then should we adhere to that other part of it which the apostles did not retain, and which is not once alluded to in the whole New Testament, but is diametrically opposite to its pervading spirit? This apparent sanction of revenge, for, to that it would amount if it were a command, not being a part of the Christian system, can claim no preeminence above the Mosaic code, but must stand or fall with the provisions of this code, according as it is suited or otherwise, to the existing state of society.

The Mosaic code was a code of blood. It had one general penalty, like the code of Draco, and that penalty was death. The soul that presumptuously broke any of the commandments should be utterly cut off. (Numbers xv. 22, 23, 30, 31.) The children of Israel are represented as crying out "Behold, we die, we perish, we all perish."—Which was literally true, for sentence of death was pronounced against them, all that were over twenty years of age, except Caleb and Joshua, for their unbelief; (Numbers xiv. 29, 32, 35.) and their carcasses fell in the wilderness, as was denounced against them when they murmured at Kadesh. Moses and Aaron died for their sin at Meribah, one upon mount Hor, and the other on mount Nebo. (Numbers xx. 12, 28. Deuteronomy xxxii. 50, 51. xxxiv. 5.) For an idea of the strength of the motives it was necessary to set before such a people, one may consult the twenty-seventh and several following

chapters of Deuteronomy. The severity with which they were chastised may be seen in the destruction of Korah and his company, and of fourteen thousand seven hundred men the very next day, Numbers xvi.; of twenty-four thousand men, Numbers xxv.; of Achan, burnt with his wife and children for purloining forbidden plunder; in the extermination of all the women and children, and most of the men of the tribe of Benjamin for the sin of a part of the men; and of the men of Kadesh Barnea because they would not assist in the slaughter. Yet none of these punishments appear to have had any lasting effect upon them. It would seem as reasonable to urge that christians ought to adopt their rules of war against the Canaanites, as to pretend that a criminal code suited to their character could be suited to ours. Polygamy was not forbidden by that code; bigamy was expressly recognized. Deuteronomy xxi. 15. The trial by ordeal was instituted. Numbers v. 11–13. Witches and wizards were sentenced to death. Exodus xxii. 18. Leviticus xx. 6, 27. When all these regulations were proper and necessary, it was no doubt equally proper, and for precisely the same reasons, that murder should be punished with death.

It would have been strange indeed if a different punishment had been decreed for murder. Of the ten commandments, one, the tenth, cannot be enforced by any human tribunal, because coveting cannot be known until it manifests itself in an overt act. But every one of the other nine commandments was in some cases sanctioned with the penalty of death. This penalty for infractions of the first and second commandments may be found established in Deuteronomy xiii. 1–5; the false prophet to be put to death: 6–11 one who entices to the service of false gods to be stoned: 12–16 city serving false gods to be sacked,

burnt, and never rebuilt, all the inhabitants and cattle utterly destroyed with the edge of the sword: xvii. 2–7 any worshipper of sun or moon or other gods to be stoned: prophet in the name of other gods or without authority xviii. 20, to die. So he that sacrificed to any other god, Exodus xxii. 20: or worshipped Molech, Leviticus xx. 1–5. This law was executed in the slaughter of three thousand worshippers of the golden calf, Exodus xxxii. 27, 28. So strictly was religious worship guarded with this penalty, that it was denounced for not keeping the passover, for sacrificing at home, for eating the fat of the ox, sheep or goat, or of any animal used in sacrifice, for eating blood, counterfeiting the holy ointment used by priests, Exodus xxx. 33, or the holy perfume, 38, or touching, or seeing, or coming nigh the holy things, Numbers iv. 15, 20. xviii. 7, 22, 32.

The laws under this head have been enumerated more particularly, to show in a striking light how opposite was their government in its nature and objects to ours, since for these and analogous crimes, which they punished with death, we have no punishment whatever, and by our constitution they are left to every man's own conscience.

The breach of the third commandment, when it amounted to blasphemy was punished by stoning to death: Leviticus xxiv. 10–16: the execution is recorded in the twenty-third verse. The observation of the fourth commandment was guarded with the same penalty. Exodus xxxi. 14. xxxv. 2. Numbers xv. 32–36. This penalty was extended to the keeping the tenth day of the seventh month, Leviticus xxiii. 29, 30. The slightest infraction of the prescribed rest, gathering a few sticks, was enough to justify death. The sanction of the fifth commandment may be found in Deuteronomy xxi. 18–21: in Exodus xxi.

15–17 : and in Leviticus xx. 9. For smiting or cursing them, or for disobedience, on the testimony of his parents, the stubborn son was stoned to death.

Under the seventh commandment, adultery was punished with death. Leviticus xx. 10. Deuteronomy xxii. 22 : so when only constructive, Deuteronomy xxii. 23 : so the violation of a betrothed damsel. Deuteronomy xxii. 25 : though if she were not betrothed the punishment was merely a fine. So death was the penalty for incest, bestiality and sodomy, Leviticus xx. 12–16. Exodus xxii. 19. The daughter of a priest who should offend against chastity was burnt to death. Leviticus xxi. 9. The bride suspected not to be a maid, upon a very uncertain test, was stoned to death. Deuteronomy xxii. 20, 21.

One breach of the eighth commandment was capital : man-stealing. Deuteronomy xxiv. 7. Exodus xxi. 16. So also was the violation of the ninth commandment, when the witness falsely charged another with a capital crime : Deuteronomy xix. 21 : upon the principle of retaliation. Thus were all the commandments sanctioned by the same bloody penalty, and they are described by the Deity himself in these remarkable words "Wherefore I gave them statutes which were not good, and judgments whereby they should not live." Ezekiel xx. 25. Under such a system it would have been strange indeed if the punishment of death had not been inflicted for murder, but because it was naturally a part of that system, it cannot follow that it should be a part of ours. The command "thou shalt not kill," is undoubtedly a part of the christian system, indeed it is repeated by the Savior, and it seems, standing, as it does, without any qualification, to forbid capital punishment, quite as peremptorily as it does murder. If we are to look back to the Mosaic code for

qualifications and exceptions, and for the rule of punishment, then we are called on to adopt again the unchristian spirit of revenge, and the rule of retaliation so pointedly condemned by the Savior in his sermon on the mount. Matthew v. 38, 39. "Ye have heard that it hath been said, *an eye for an eye, and a tooth for a tooth;* but I say unto you that ye resist not evil. * * * * Love your enemies, bless them that curse you, do good to them that hate you," &c. The old law of murder is alluded to in the twenty-first verse of the same chapter, but instead of approving it, the Great Teacher turns abruptly from it, to inculcate lessons of good will, forgiveness, and love, and to contrast the mild and pure spirit of a religion seated in the heart with the crude, gross, and imperfect ideas of morality and religion, which prevailed among his hearers. No principle of the old law does he censure more distinctly and decidedly than that of retaliation, upon which the punishment of murder is grounded. The principle is laid down in Deuteronomy xix. 19–21, and applied to perjury. "Then shall ye do unto him, as he had thought to do unto his brother. * * And thine eye shall not pity; but life shall go for life; *eye for eye, tooth for tooth*, hand for hand, foot for foot." So in Exodus xxi. 23–25. "And if any mischief follow, then thou shalt give life for life, *eye for eye, tooth for tooth*, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe:" and v. 28, the ox that gores a man shall be stoned. So in Leviticus xxiv. 17–22; "And he that killeth any man shall surely be put to death. And he that killeth a beast shall make it good; beast for beast. And if a man cause a blemish in his neighbor; as he hath done so shall it be done to him; breach for breach, *eye for eye, tooth for tooth;* as he hath caused a blemish in man, so shall it be done to

him again. And he that killeth a beast he shall restore it; and he that killeth a man he shall be put to death." In all these passages the principle is to return to the criminal the amount of evil he had inflicted. The Jews were taught to love their neighbor and hate their enemy, whom they regarded as the enemy of God, to be "utterly destroyed." See instances in Deut. II, 34. XX. 17. Josh. VI. 21. VIII. 26, X. 28, 30, 32, 33, 35, 37, 39, 40, and numerous others. Christ in teaching, love your enemy, rebukes this propensity, and commands to do good to them which hate you, and like the Highest, to be kind unto the unthankful and the evil. "Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned: forgive and ye shall be forgiven." "Be ye therefore merciful, as your Father also is merciful;" Luke VI. 27, 38: these are the precepts of the gospel, which the apostle sums up in a rule precisely opposite to the Mosaic law of retaliation, condemned by Christ; "*Recompense to no man evil for evil.*" Romans XII. 17.

In case of murder, the Mosaic law allowed revenge to have free scope as it does among our North American Indians. There was no judge called in, but the nearest relative revenged the wrong. The improvement which this system introduced into the natural law of savages was simply providing a place of refuge for the man who had *accidentally* slain another. Ex. XXI 12–14. Deut. IV. 41. XIX. 1–13. Joshua XX. 1–9. It would seem that manslaughter was punished with death as well as murder, though of this there may be a doubt. Lev. XXIV. 17. 21. Numbers XXXV. 11–30. Our fathers understood, from these passages, that manslaughter was a capital crime, and they enacted, Col. Laws, page 59, "If any person slayeth another suddenly, in his anger or cruelty of passion, he

shall be put to death." By the passage last cited it appears, that even in case of purely accidental homicide, where one killed another *unawares*, "and was not his enemy, neither sought his harm," the revenger of blood was allowed to kill the slayer, if he could find him any where without the city of refuge, before the death of the high priest.

The principles developed in this law are as diametrically opposed to the spirit of Christianity, and as unsuited to the circumstances of our times, and the existing state of society as the law which directs circumcision under pain of death: Gen. xvii. 14. Ex. iv. 24: or the law which punishes with death, contempt of court, or disobedience of the court, in not hearkening unto the priest or judge: Deut. xvii. 13. We might as well adopt their law of Mayhem, which rests on the same principles,—we might as well adopt polygamy which was permitted to the patriarchs, recognized in the law of Moses, practiced in the time of Christ and the apostles, and not forbidden by them, as to legalize the passion of revenge, which they did forbid, by borrowing the Jewish law of murder, manslaughter and accidental homicide. If we are to inflict capital punishment for murder because private revenge was allowed to operate unimpeded among the Jews, we have the same authority for the practice of assassination. We are told, in Judges iii. 15. 30, that the Lord raised up Ehud a deliverer, who, under the pretence of a secret errand to Eglon, king of Moab, obtained an audience of him in his private parlor, and drawing with his left hand a two-edged dagger, stabbed him in the abdomen, and going out locked the door upon the dead body of the tyrant. In chapter fourth is an account of the treacherous murder of Sisera, captain of the host of Jabin, by Jael, the wife of Heber,

who was at the time at peace with Jabin. She enticed him into her tent by an offer of hospitality: he partook of her refreshment and trusting to her friendly protection, was soon fast asleep. Then Jael went softly to him with a nail and a hammer, and smote the nail into his temples, and fastened it into the ground. In christian morality, and without the divine warrant, which indeed no where appears in the history, this whole transaction would be one of unequivocal baseness, yet the whole of the next chapter is an anthem of exultation over the betrayed and slaughtered chief; and in the twenty-fourth verse, Deborah, the prophetess, says of the assassin, "Blessed above women shall Jael the wife of Heber, the Kenite, be, blessed shall she be above women in the tent," and this is followed by bitter mockery of the bereaved mother of Sisera, by Deborah, who styles herself "a mother in Israel," (v. 7.) and the song of praise and triumph closes with a prayer, "so let all thine enemies perish, O Lord, &c." Upon whatever principles these passages are to be explained, the purpose for which we quote them is indisputable, that the acts of Ehud and Jael are not examples for the imitation of christians, neither are those maxims of revenge which make up their penal code, to whom Moses gave precepts for the hardness of their hearts. The government of the Jews was altogether peculiar, and intended to effect peculiar ends. It will not answer to imitate it without the special assistance, which was vouchsafed to the heads of that government; least of all, to imitate it in those particulars, in which it is farthest from the benignant spirit of the gospel.

If any one were to propose to restore the whole Jewish law of homicide, the absurdity would be perfectly apparent; yet, that part which we retain seems no less repugnant to

christian principles than those provisions which we so long ago abandoned.

Our ancestors appear to have looked for precedents in the Jewish code, and accordingly they punished with death breaches of the first and second commandments, witchcraft, blasphemy, even in pagan Indians, murder, manslaughter, bestiality, sodomy, adultery, actual or constructive, manstealing, perjury against life, conspiracy, rebellion, cursing a parent, smiting a parent, disobedience of parents, ravishing a maid, but not a married woman, abusing a child under ten years. Most of these crimes have long ceased to be capital, but the consequences of that early mistake were too awful ever to be forgotten. The warning should not be lost, but we should learn from it to construct our penal laws upon the principles of reason, and from a knowledge of human nature, instead of blindly copying what was intended for a character unlike our own, under circumstances in many respects opposite to ours.

Your committee are aware, that a scriptural argument is not the ordinary mode of treating a question of modern legislation; but, believing that difficulties existed in many minds from a narrow view of the bearing of Jewish law on modern society, from a misunderstanding of some passages, and a neglect of others, and omitting to apply to the question the distinctive characteristics of the christian dispensation; they thought it their duty to endeavor to remove these difficulties. They are aware, also, that their remarks on this branch of the subject, contain no new information to those who are familiar with their bibles; but scripture is so often quoted by those who appear not to have examined it, that it may be useful by means of numerous references, to make an examination of the whole subject easy to any one wishing to enter upon it.

Your committee have confined themselves to the discussion of three questions : 1. Has society a right from the social compact to take away life? 2. Is there any thing peculiar to either of our six capital crimes which requires the punishment of death ? 3. Is there any command in scripture which enjoins on us to inflict that punishment in any case? They have preferred to give somewhat thorough and extended answers, to each of these questions, rather than to go over the whole ground which they might have occupied. To enter upon important considerations which remain untouched, would enlarge the limits of this report beyond what customary usage would justify. They, therefore, conclude with the words of his Excellency, "the people of America should be the last blindly to adhere to what is established merely as such ; and it may sometimes be our duty to imitate our forefathers, in the great trait of their characters,—the courage of reform,—rather than to bow implicitly to their authority in matters, in which the human mind has made progress since their day."

And they ask leave to introduce a Bill to abolish the Punishment of Death.

All which is respectfully submitted,

Per order of the Committee,

ROBERT RANTOUL, Jr. *Chairman.*

Commonwealth of Massachusetts.

In the Year of our Lord One Thousand Eight Hundred and Thirty-Six.

AN ACT

To Abolish the Punishment of Death.

BE *it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same:*

SEC. 1. Every person who shall commit the crime of Treason against this Commonwealth, shall be punished by imprisonment in the State Prison for Life.

SEC. 2. Every person who shall commit the crime of Murder, shall be punished by imprisonment in the State Prison for Life.

SEC. 3. If any person shall assault another, and shall feloniously rob, steal, and take from his person any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or, if being so armed, he shall wound or strike the person robbed, he shall be punished by imprisonment in the State Prison for Life.

SEC. 4. If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will; or shall unlawfully and carnally know and abuse any woman child under the age of ten years, he shall be punished by imprisonment in the State Prison for Life.

SEC. 5. Every person who shall wilfully and maliciously burn, in the night-time, the dwelling-house of another; or, shall set fire to any other building, by the burning whereof such dwelling-house shall be burnt in the night-time, shall be punished by imprisonment in the State Prison for Life.

SEC. 6. Every person who shall break and enter any dwelling-house in the night-time, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony; or, after having entering with such intent, shall break any such dwelling-house in the night-time, any person being lawfully therein; and the offender being armed with a dangerous weapon at the time of such breaking or entry, or so arming himself in such house; or making an actual assault on any person being lawfully therein, shall be punished by imprisonment in the State Prison for Life.

SEC. 7. If any person shall commit the crime of murder, or either of the crimes mentioned in the 4th section of this act, all contracts, of whatever nature, to which he shall be a party, shall be affected, changed, or annulled, in the same manner as they severally would have been by his death. The bonds of matrimony to which he shall be a party, shall be dissolved; he shall cease to have any title to, or interest in his estate, real and personal, and the same shall be treated, be disposed of, and descend, in all respects as if

his actual death had taken place at the time of his conviction of such crime; and all power and authority of whatever nature, which he might lawfully exercise over any other person or persons, shall, from and after such conviction cease, as if he were dead.

SEC. 8. Nothing in this act shall be understood to make any crime herein mentioned bailable, otherwise than it would have been before the passage of this act.